Supreme Court, U.S.
FILED

001952 JUN 27 2001

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No.:

In the
Supreme Court of the United States

Gregory Allen Brown,

Petitioner,

v.

Joe S. Hopper, Commissioner of
the Alabama Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the admission of a confession obtained from a defendant in a custodial interrogation, after he has clearly invoked has right to counsel and the request has been disregarded, a violation of both the Fifth and Sixth Amendments to the United States Constitution so as to require a reversal of a conviction obtained thereby?

2. Is a lower court's reconsideration of already determined factual issues proper after the United States Supreme Court remands a case with instructions to reconsider in light of a recently decided case?

3. Is the admission of a confession obtained following promises of beneficial treatment to the accused by interrogating officers a violation of the United States Constitution so as to require a reversal of a conviction obtained thereby?

PARTIES TO THE PROCEEDINGS BELOW

The only parties to the proceedings below are the Petitioner-Appellant, Gregory Allen Brown, and the Respondent-Appellee, Joe S. Hopper, in his capacity as Commissioner of the Alabama Department of Corrections.

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CITATIONS TO REPORT AND OPINIONS BELOW

Federal Habeas Corpus Decisions

The decision of the United States Court of Appeals for the Eleventh Circuit, dated March 29, 2001, which affirmed the District Court's opinion is unreported and is included herein at App. 1. The decision of the United States Court of Appeals for the Eleventh Circuit, dated April 21, 2000, which granted in part and denied in part Petitioner's request for a certificate of appealability is unreported and is included herein at App. 2. The opinion of the United States District Court for the Northern District of Alabama, Middle Division, dated September 21, 1999, which denied Petitioner's Motion for a Writ of Habeas Corpus is unreported and is included herein at App. 3-18. The Magistrate's Report and Recommendation of the United States District Court for the Northern District of Alabama, Middle Division, dated February 25, 1999, is unreported and is included herein at App. 19-57.

Direct Appeal Decisions

The opinion of the Alabama Supreme Court denying Petitioner's petition for a writ of certiorari is reported at Ex parte Gregory Allan Brown, 668 So. 2d 105 (Ala. 1996). Ex parte Gregory Allan Brown is included herein at App 58-62. The opinion of the Alabama Court of Criminal Appeals reinstating Petitioner's conviction is reported at Brown v. State, 668 So. 2d 102 (Ala. Crim. App. 1995) ("Brown II"). Brown II is included herein at App. 63-71. The decision of the United States Supreme Court granting certiorari, vacating the opinion below, and remanding the case, is reported at Alabama v. Brown, 513 U.S. 801 (1994). Alabama v. Brown is included herein at App. 72. The opinion of the Alabama

Court of Criminal Appeals reversing Petitioner's conviction is reported at Brown v. State, 630 So. 2d 481 (Ala. Crim. App. 1993) ("Brown I"). Brown I is included herein at App. 73-82.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the United States District Court for the Northern District of Alabama was entered on March 29, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

This case involves the Fifth Amendment to the United States Constitution:

> No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

This case also involves the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

This case also involves Section I of the Fourteenth Amendment to the United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of law.

STATEMENT OF THE CASE

In 1991, Mr. Brown was indicted for his role in the murder of Jerry W. Callahan.[1] See Brown v. State, 630 So. 2d 481, 482 (Ala. Crim. App. 1993) ("Brown I") (App. 74). Following a jury trial, Mr. Brown was found to be guilty as charged in the indictment. See id. The trial court accepted the jury's recommendation that Mr. Brown be sentenced to life imprisonment without the possibility of parole. See id.

In the course of their investigation into Callahan's murder, the Hoover, Alabama police discovered that Callahan and Mr. Brown had been involved in a high-stakes blackjack game the night before Callahan was killed. See id.; App. 75. The police contacted Mr. Brown and requested that he meet with them at the Hoover police department to discuss the investigation. See Brown I, 630 So. 2d at 482; App. 76. Mr. Brown, who had no criminal record and no prior dealings with the criminal justice system, agreed to meet with the detectives. See id. Shortly before the meeting was to take place, the detectives, who were watching Mr. Brown's house,

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1. Mr. Brown's Co-Defendant, Robert Paul Gospodareck, a former police officer and deputy sheriff, confessed to killing Callahan. See Gospodareck v. State, 666 So. 2d 835, 836 (1993). Mr. Brown was not even present when the murder took place. See id. at 835.

saw Mr. Brown get into his car and drive in a direction that they considered to be the opposite direction of the police station in Hoover, Alabama. See Brown I, 630 So. 2d at 482-83; App. 76. Suspecting that he was leaving without speaking to them, the detectives called the Gardendale, Alabama police and asked them to stop Mr. Brown. See id. at 483; App. 76. After stopping the vehicle, the Gardendale police called the Hoover investigators to the scene. See id. Mr. Brown informed the investigators that he was still planning to meet with them. See id. Mr. Brown later explained to the police that he was on his way to his attorney's office when they stopped him and that was the reason he was not driving directly to the Hoover police station. See App. at 48 n.7.

When they arrived at the vehicle, the Hoover detectives saw a .45 caliber handgun inside Mr. Brown's car.[2] See Brown I, 630 So. 2d at 483; App. 76. Mr. Brown told the investigators that Callahan had given him the gun. See id. The investigators looked in the car, with Brown's permission, and found a note that was written by Callahan. See id. The note expressed Callahan's wish to die. See id.; App. 76-77. In it, Callahan claimed that he had a terminal illness and wanted to die with dignity. See id. (setting forth text of note). At trial, experts confirmed that the note was handwritten by Callahan. See id.; App. 77.

The investigators then read Mr. Brown his Miranda rights, placed him under arrest and took him to the Hoover police station. See Brown I, 630 So. 2d at 483; App. 77. At

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2. The gun that killed Callahan was a .380 caliber handgun. See Gospodareck, 666 So. 2d at 839. It was recovered during the investigation of Gospodareck. See id.

the station, Mr. Brown was interrogated at different times by three police officers. See id. The interrogation was video-taped and later transcribed. See id. Approximately one-third of the way through the interrogation, but before Mr. Brown made any self-incriminating statements he clearly requested the assistance of counsel. The following conversation took place:

Q: (By Sgt. Braden) From the very start.

Q: (by Det. Zarzour) From the very start. From the time he gave you the letter --

A: (Mr. Brown) Okay.

Q: Go ahead.

A: **Is it going to piss y'all off if I ask for my -- to talk to a friend that is an attorney. I mean, I'm going to do whatever I have got to do. Don't get me wrong.**

Q: Well, I understand that. I understand what you are saying.

A: You have got to realize, man, I'm f***ing scared to death.

Q: Well, and rightfully so. I don't blame you one bit because there's a serious problem here, but if you didn't pull the

trigger, then we need to know what exactly happened, okay?

Q: (Braden) It's up to you, Greg, whatever you want to do. Like he said.

A: Listen, I don't know exactly what happened. I was not there.

Q: (Zarzour) Okay.

Q: (Braden) We know you met -- we know you met him over at Pick-a-Pack, we know y'all left, we know you brought him back. We know all that. We know where you were, we have got people that have seen you, we know. It's like I told you earlier, we already know.

Q: (Zarzour) That's why I said don't beat around the bush, let's get to it and get it over with.

A: All right. . . .

Brown I, 630 So. 2d at 483-84; App. 78-79.

The investigators did not cease the interrogation after Mr. Brown's request for counsel. Indeed, Detective Zarzour indicated that he understood that Mr. Brown was requesting counsel. See id. at 483; App. 78. Then Sergeant Braden ignored the request and proceeded to convince Mr. Brown that the investigators already knew how he was involved in

the crime and implied to Mr. Brown that his statement was a mere formality. See id. at 484; App. 79. As he had already expressed to the officers that he was scared and did not want to provoke any hostility from them, Mr. Brown reasonably interpreted the continued questioning as a denial of his request for counsel. It was not until after this colloquy that Mr. Brown gave the investigators information about Callahan's death. See id. Mr. Brown also made a written statement, at the officers' request, after the interrogation. See id. at 483; App. 79.

Also during the course of this interrogation, the investigators made several attempts to convince the Petitioner that it "would be better" for him if he cooperated and told them everything. They made several statements to the Petitioner including the following among others:

> Q: "Now, what you tell us and what you help yourself is up to you, Greg, not us. It's up to you. If you didn't pull the trigger, you need to tell us. You need to tell us who did and we need to hear the whole story and be done with it and get this thing over with and clear it up, Greg, because it is putting heat on everybody and you are going to get some heat on you, but the degree of heat you're going to get is up to Greg. It's not up to us, it's up to Greg. Okay? . . ."
>
> "I don't think if I didn't pull the trigger, Greg, I don't think I would take the heat for it, buddy. To be truthfully

honest with you. It means a hell of a lot of difference in the court's eye who pulled the trigger, okay? I think it makes a lot of difference.

But if he did, we need to know about it and we need to straighten it up and clear it up right now as fast as we can. Because the longer we wait the tougher it is for everybody. . . ."

. . .

Q: "We have got to have – we have got to have you help yourself here, Buddy. Not us, you help yourself. And if you are honest with us and you come through this stuff – let's talk about it."

. . .

Q: "Okay. I know it's hard for you. I'm not going to say it is an easy task for you to do this, but what I'm telling you is the quicker we get this done, the better it is going to be for you. Okay? . . ."

Q: "All the arrows are pointing toward Greg right now. And I don't think that's fair. No, that's not. I don't think that's fair at all. And I don't think - personally, I don't think Jerry (the

> victim) would have wanted it that way. I may be wrong."

App. 51-53

It was only after these statements were made to him that the Petitioner gave the incriminating statement that was later used against him at trial. And, as if that were not enough, after the Petitioner had told them just about everything, the investigator added the following comment to the Petitioner:

> Q: "And - I want to ask you something else. So much of the cat is out of the bag. I know we - we have got a lot of loose ends to tie up, things we are going to have to do. You have cooperated and I couldn't ask for anything, you know, and ***like I said, that's what I'll do for you - we will go in and do the best we can do. I'm not a hard ass for people who cooperate, okay?***" (emphasis added).

App. 54

It was only after the Petitioner's request for counsel was denied, and these promises and inducements were made that he gave the incriminating statements that were later used at trial to link him to this crime. Without Mr. Brown's inculpatory statements, the State had little evidence (which was circumstantial and tenuous at best) to connect Mr. Brown to Gospodareck's murder of Callahan. See Brown I, 630 So. 2d at 485; App. 82 (reversing and remanding for new trial).

Hence, without the use of these illegally obtained statements, there is a high probability that the jury would not have convicted the Petitioner for this offense.

Proceedings Below

Petitioner Gregory Allen Brown was indicted in June 1991 for the murder of Jerry Wayne Callahan. Following a pretrial suppression hearing, at which the trial judge ruled Mr. Brown's oral and written statements would be admitted into evidence, and the case went to trial on September 16, 1991. After a five day trial, the jury returned a guilty verdict and recommended a sentence of life imprisonment without the possibility of parole. See Brown I, 630 So. 2d at 482; App. 74. The trial judge accepted the recommendation and sentenced Mr. Brown on November 1, 1991. See id.

Mr. Brown appealed his conviction and sentence to the Alabama Court of Criminal Appeals. In an unanimous decision, the Court of Criminal Appeals reversed the conviction on the grounds that Mr. Brown's confession was secured in violation of his constitutional rights. Brown I, 630 So. 2d at 484; App. 82.

The State of Alabama's request for rehearing was denied on September 30, 1993. As well, the State's Petition for Writ of Certiorari was denied by the Alabama Supreme Court on December 13, 1993. The State then filed a Petition for Writ of Certiorari in this Court. This Court granted the State's petition, vacated Brown I, and remanded the case back to the Alabama Court of Criminal Appeals for further consideration in light of Davis v. United States, 512 U.S. 452 (1994). See Alabama v. Brown, 513 U.S. 801 (1994); App. 72.

Upon reconsideration, the Court of Criminal Appeals disregarded its earlier factual finding that Mr. Brown's statements were "clearly an invocation of his right to counsel." See Brown II, 63-71; Brown I, 630 So. 2d 484; App. 80. In its opinion in Brown II, the Court of Criminal Appeals affirmed Mr. Brown's conviction and sentence. See Brown II, 668 So. 2d at 104-05; App. 69. The presiding judge, Judge Taylor, dissented in a strong opinion which points out the realities of the interrogation of "an intimidated suspect who is in close confinement and is surrounded by law enforcement officers." Brown II, 668 So. 2d at 105; App. 70-71.

Mr. Brown's application for a rehearing was denied without opinion on May 5, 1995. See id. at 102; App. 63. Mr. Brown then filed a Writ of Certiorari in the Alabama Supreme Court which was denied, over the dissent of Justice Maddox, on September 15, 1995. See Ex parte Gregory Allan Brown, 668 So. 2d 105 (Ala. 1996); App. 59-62. In his dissent, Justice Maddox pointed out that just after Mr. Brown made his request for counsel "that the interrogating officers were aware that the statement by the defendant could 'reasonably [have been] construed to be an expression of desire for the assistance of an attorney.'" Ex parte Gregory Allan Brown, 668 So. 2d 105, 106-07 (Ala. 1996) (Maddox, J., dissenting) (quoting Davis, 512 U.S. at 459 (citation omitted in original)); App. 61-62.

Mr. Brown's habeas corpus petition was filed in the United States District Court for the Northern District of Alabama on January 31, 1997. The petition asserts that Mr. Brown was denied his constitutional right to counsel during his custodial interrogation. The petition also asserts that Mr. Brown's confession was improperly extracted through promises of beneficial treatment. On February 25, 1999, a

magistrate judge at the Northern District of Alabama entered a Report and Recommendation that Mr. Brown's petition for habeas corpus be denied. See App. 57. Thereafter, the District Court entered an opinion, over Mr. Brown's objection to the Report and Recommendation, that the petition for habeas corpus be denied. See App. 18.

Although the District Court refused to issue a Certificate of Appealability, on April 24, 2000, the United States Court of Appeals for the Eleventh Circuit granted in part and denied in part Mr. Brown's petition for a Certificate of Appealability. App. 2. The Certificate of Appealability was granted only as to the issue whether Mr. Brown's statements constituted a request for counsel that rendered his confession inadmissible. On appeal the Eleventh Circuit affirmed, without opinion, the District Court's decision thereby denying Mr. Brown's petition for habeas corpus. Judgment was entered in the Eleventh Circuit on March 29, 2001. App. 1.

Mr. Brown was convicted largely on account of incriminating statements that he made during a custodial interrogation. These statements were obtained in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. His conviction and sentence should not be allowed to stand.

REASONS FOR GRANTING THE WRIT

I. MR. BROWN'S CONFESSION WAS INADMISSIBLE BECAUSE HIS REQUEST FOR COUNSEL WAS UNAMBIGUOUS

The United States Constitution guarantees that "[n]o person . . . shall be compelled in any criminal case to be a

witness against himself" and that "the accused shall . . . have the Assistance of Counsel." U.S. Const. amends. V, VI; Miranda v. Arizona, 384 U.S. 436, 442 (1966). It has long been held that a suspect in custody who has invoked his right to counsel has the "'undisputed right' . . . to be free of interrogation 'until he had consulted with a lawyer.'" Edwards v. Arizona, 451 U.S. 477, 485 (1981) (quoting Rhode Island v. Innis, 446 U.S. 291, 298 (1980)). Indeed, the right to counsel is such a significant right that once invoked "the interrogation must cease until an attorney is present." Id. (quoting Miranda, 384 U.S. at 474).

A suspect's invocation of the right to counsel "'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of counsel.'" Davis v. United States, 512 U.S. 452, 459 (1994) (quoting McNeil v. Wisconsin, 501 U.S. 171, 178 (1991)). In Davis, this Court held that a suspect's request for counsel must be unambiguous. Id. at 459. Explaining this standard, the Court stated, "[a]lthough a suspect need not 'speak with the discrimination of an Oxford don,' . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Id. (citation omitted).

The Fifth Circuit recently stated that: "In deciding whether a request for counsel is sufficiently clear to constitute an invocation of the right to counsel, we must consider 'the totality of the circumstances,' and we must also remain mindful of the teachings of Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404, 1409, 89 L. Ed. 2d 631 (1986), wherein the Supreme Court, cognizant of the settled principles of indulging every presumption against waiver and resolving all

doubts in favor of protecting constitutional claims, stated that the courts must 'give a broad, rather than a narrow, interpretation to a [suspect's] request for counsel.'" Soffar v. Johnson, 237 F.3d 411, 455 (5th Cir. 2000).

It is clear from the colloquy between Mr. Brown and the detectives that not only should they have understood his statement to be a request for counsel, but they in fact did understand that Mr. Brown wanted to speak to an attorney. As observed earlier, immediately following Mr. Brown's statement "*[i]s it going to piss y'all off if I ask for my -- to talk to a friend that is an attorney. I mean, I'm going to do whatever I have got to do. Don't get me wrong . . .*," Detective Zarzour responded, "*[w]ell I understand that, I understand what you are saying.*" In the context of the interrogation, there is only one thing Zarzour could be understanding -- Mr. Brown's desire to see a lawyer before he talked any more unless it was going to make the officers angry.

In his dissenting opinion in Brown II, Presiding Judge Taylor put Mr. Brown's request in the context of the custodial interrogation:

> The phrase, "Is it going to piss y'all off if . . ." suggests that the interrogatee did not want to arouse the anger of the interrogators. The phrase, "I mean, I'm going to do whatever I have got to do," indicates that the interrogatee thought that he would have to make a statement and was not refusing to "do whatever [he has] got to do." The phrase, "Don't get me wrong," again is a request to the interrogators not to interpret any of the interrogatee's actions as hostile or uncooperative. Once these

> fear-based qualifying statements from the interrogatee are dealt with, what he is saying is that he wanted to "talk to a friend that is an attorney." *This is a real-life interrogation and a real-life request for an attorney by an intimidated suspect who is in close confinement and is surrounded by law enforcement officers.*

Brown II, 668 So. 2d at 105 (Taylor, P.J., dissenting) (emphasis added); App. 71.

Moreover, Justice Maddox dissented from the Alabama Supreme Court's denial to grant certiorari of Brown II. Justice Maddox observed that "the interrogating officers were aware that the statement by the defendant could 'reasonably [have been] construed to be an expression of a desire for the assistance of an attorney.'" Ex Parte Gregory Allan Brown, 668 So. 2d at 106 (Maddox, J., dissenting) (quoting Davis, 512 U.S. at 459); App. 61.

Justice Maddox further pointed out that:

> Although all of the Justices of the Supreme Court concurred in the result of the opinion in the Davis case, four Justices concurred only because the interrogators had stopped questioning after the defendant made his ambiguous request, in order to determine if the defendant was, in fact, requesting counsel. The interrogators did this clearly and resumed their questioning only after the defendant told them that he was not requesting counsel at that time. These four Justices (Justices Stevens,

> Blackmun, Souter, and Ginsberg) concurred for this reason and stated that they felt that a rule should be adopted requiring officers to inquire whether the defendant was asking for counsel. . . .

Id., App. 62.

Indeed, in this case both officers failed to cease the interrogation, **despite the fact that they knew Mr. Brown expressed a desire for counsel**. As previously noted, Detective Zarzour explicitly expressed understanding of the request: "*Well, I understand that. I understand what you are saying.*" Ignoring the request, Detective Zarzour implied to Mr. Brown, after Mr. Brown stated that he was "*scared to death*," that if he was not guilty, then he would not need a lawyer: "*Well, and rightfully so. I don't blame you one bit because there's a serious problem here, but if you didn't pull the trigger, then we need to know what exactly happened, okay?*" Sergeant Braden followed up by indicating that he understood that Mr. Brown was requesting counsel, but implying that counsel was not necessary and that Mr. Brown's statement was a mere formality: "*It's up to you, Greg, whatever you want to do. Like he said . . . . We know you met -- we know you met him over at Pick-a-Pack, we know y'all left, we know you brought him back. We know all that. We know where you were, we have got people that have seen you, we know. It's like I told you earlier, we already know.*" Detective Zarzour then told Mr. Brown: "*That's why I said don't beat around the bush, let's get to it and get it over with.*" It was not until this point that Mr. Brown -- believing that they were not going to allow him to call counsel -- gave in to the officers and made self-incriminating statements.

The police officer's questioning that followed Mr. Brown's request for counsel is precisely what the Miranda right to counsel rules seek to prevent. Namely, the interrogation is supposed to stop "to prevent the police from badgering a witness into waiving his previously asserted Miranda rights." Davis, 512 U.S. at 458 (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)). Indeed, in his dissenting opinion from the denial of certiorari by the Alabama Supreme Court, Justice Maddox observed that "the substance of the colloquy could be construed as showing that the interrogators were suggesting to the petitioner that if he was not guilty, then there would be no need for counsel." Ex Parte Gregory Allan Brown, 668 So. 2d at 106; App. 61-62.

It is clear from a review of the entire colloquy that the police understood that Mr. Brown wanted counsel, and that the police pushed him to proceed without providing an opportunity to confer with counsel. These actions were in direct violation of Mr. Brown's Fifth, Sixth, and Fourteenth Amendment rights. Moreover, the application of the holding in Davis to the facts of Mr. Brown's case was unreasonable in light of his unequivocal request for counsel. See Williams v. Taylor, 120 S. Ct. 1495, 1523 (2000). Consequently, Mr. Brown's subsequent oral and written confessions were due to be suppressed. Their admission at trial was reversible error and mandates the granting of Mr. Brown's petition for habeas corpus.

II. THE LAW OF THE CASE DOCTRINE PRECLUDED RECONSIDERATION OF THE CLARITY OF MR. BROWN'S REQUEST FOR COUNSEL

In its first opinion overturning Mr. Brown's conviction, the Alabama Court of Criminal Appeals unanimously held:

> In this case, the appellant's request to speak to a friend who is also an attorney **was clearly an invocation of his right to counsel.** Further interrogation by the investigators without providing the appellant the opportunity to confer with an attorney violated the appellant's Fifth Amendment rights as discussed in Miranda and Edwards.

Brown I, 630 So.2d at 484 (emphasis added); App. 80. This factual finding by the Court of Criminal Appeals that Mr. Brown's request to speak to his friend who is an attorney was clearly an invocation of his right to counsel is the law of the case and must be adhered to on subsequent review. The holding in Davis does not affect the factual conclusion that Mr. Brown's request for counsel was clearly invoked. Davis only applies where a request for counsel is ambiguous. Clearly, this is not the case here.

It is a well established principle of both Alabama and federal law that "[u]nder the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.'" Callahan v. State, No. CR-97-1202, 1999 WL 254480 (Ala. Crim. App. Apr. 30, 1999) (quoting United

States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997)). When an issue has been decided by a court, that issue "continues to be the law of that case, whether or not correct on general principles, so long as the facts on which the decision was predicated continue to be the facts of the case." Stephens v. Stephens, 718 So. 2d 54, 55-56 (Ala. Civ. App. 1998); see also, e.g., United States v. Robinson, 690 F.2d 869, 872 (11th Cir. 1982) ("Under the law of the case doctrine, both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case."). Accordingly, once the Alabama Court of Criminal Appeals found that Mr. Brown's statement was clearly a request for counsel, that court was bound by its own decision. It should not have reconsidered this factual finding after the case was sent back down by this Court.

Indeed, "vacatur and remand by the Supreme Court . . . does not create an implication that the lower court should change its prior determination." Hughes Aircraft Co. v. United States, 140 F.3d 1470, 1473 (D.C. Cir. 1998). If this Court had intended that the lower court's judgment be reinstated, it would have done so as it often does. See Union Pac. R.R. Co. v. Johnson, 249 F.2d 674, 676 (9th Cir. 1957) (citing Gibson v. Phillips Petroleum Co., 352 U.S. 874 (1956) and Williams v. Carolina Life Ins. Co., 348 U.S. 802 (1954)). In fact, the Eleventh Circuit has observed that a vacatur and remand by this Court requiring reconsideration of a decision in light of a new Supreme Court decision does not "nullify all proceedings. On the contrary, it merely require[s] the court to reconsider its opinion . . . in light of the new law set forth in [the new Supreme Court decision]." United States v. M.C.C. of Fla., Inc., 967 F.2d 1559, 1561 (11th Cir. 1992).

When this Court remanded Mr. Brown's case "for further consideration in light of Davis v. United States" (Alabama v. Brown, 513 U.S. at 801), the remand did not give the Alabama Court of Criminal Appeals license to reconsider whether Mr. Brown's statement was unambiguous, but merely to apply Davis's holding to the already determined facts of Brown. Namely, whether Mr. Brown's "*clear invocation of his right to counsel*," and the officer's failure to stop the interrogation violated Mr. Brown's constitutional rights. Indeed, nothing in this Court's Order indicated that the Court believed Mr. Brown's request to be ambiguous or equivocal. See Alabama v. Brown, 513 U.S. at 801; App. 72; see also Ex parte Gregory Allan Brown, 668 So. 2d 105, 106 (Ala. 1996) (Maddox, J., dissenting) ("I do not believe that [the Supreme] Court, by remanding this case for consideration in light of what it had said in Davis, determined that the Brown's request was "ambiguous" or "equivocal."); App. 61.

Moreover, the district court erroneously concluded that whether Mr. Brown's statement was equivocal or unequivocal was not an important factor in Brown I. See App. at 8-9. The district court based its erroneous conclusion on the grounds that the Court of Criminal Appeals (after concluding that Mr. Brown's Fifth Amendment rights had been violated by the officer's failure to terminate the interrogation) hypothesized that "even if we **assumed** that the appellant's request to speak to an attorney was equivocal or ambiguous, the failure of the investigators to clarify his request to speak to his attorney still violates Miranda." Brown I, 630 So. 2d at 484-85 (emphasis added); see also App. at 80-81.

The district court's conclusion that clarity of Mr. Brown's statement was not important overlooks the fact that the state of the law at the time Brown I was decided required

the Court of Criminal Appeals to determine whether a request for counsel was equivocal or not. If the request was unequivocal, the interrogation must cease immediately. See Edwards, 451 U.S. at 484. If the request was equivocal the police were required to clarify the request. See Owen v. Alabama, 849 F.2d. 536, 539 (11th Cir. 1988). Indeed, even subsequent to Davis, the Alabama Court of Criminal Appeals held that "[o]nce a defendant makes an ambiguous or equivocal request for an attorney, questioning must stop and the questioning officer must determine whether the request was indeed a request for counsel." C.S.H. v. State, 662 So. 2d 1230, 1231 (Ala. Crim. App. 1995) (citing Robinson v. State, 574 So. 2d 910 (Ala. Cr. App. 1990)).

Thus, the distinction was important, and was in fact made by the Court of Criminal Appeals when it determined that Mr. Brown's "request to speak to a friend who is also an attorney **was clearly an invocation of his right to counsel.**" Brown I, 630 So. 2d at 484. Accordingly, it was error for the Court of Criminal Appeals to disregard this holding when it reviewed this case in light of Davis.[3] Moreover, the denial of Mr. Brown's petition for habeas corpus is a manifest disregard of the law of the case as established by the Court of Criminal Appeals in Brown I. The opinion in Brown II, the district court's opinion and the Eleventh Circuit's decision are contrary to the clearly established federal law articulated in

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3. Contrary to the Court of Criminal Appeals' improper disregard for its prior holding, Presiding Judge Taylor consistently recognized that Mr. Brown's statement could only be interpreted as an unambiguous invocation of his right to counsel. See Brown II, 668 So.2d at 105 (Taylor, P.J., dissenting); App. 70-71.

Miranda and Edwards. Consequently, Mr. Brown's petition for habeas corpus should be granted.

III. MR. BROWN'S CONFESSION WAS INADMISSIBLE BECAUSE HIS STATEMENT WAS OBTAINED FOLLOWING PROMISES OF BENEFICIAL TREATMENT

Mr. Brown's confession was also the result of improper promises of beneficial treatment.[4] During the course of his interrogation, the officers made several statements to Mr. Brown that were promissory in nature -- promising that if he confessed --things would be better for him. Thus, the interrogation was tainted and these statements should not have been admitted into evidence.

In 1897, this Court held that a defendant's confession was inadmissible because it was acquired through the use of inducements and promises. See Bram v. United States, 168 U.S. 532, 542-43 (1897). The Court set forth the standard to be applied in determining whether a confession is admissible in evidence:

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4. The Eleventh Circuit did not grant appeal of this issue. However, the issue was raised in the petition for writ of habeas corpus and addressed by the District Court. It is Petitioner's contention that the Eleventh Circuit's failure to allow the appeal of this issue was error. This Court has authority to review the Eleventh Circuit's denial of the certificate of appealability. See Hohn v. United States, 524 U.S. 236, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998).

> In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by the portion of the Fifth Amendment to the Constitution of the United States commanding that no person "shall be compelled in any criminal case to be a witness against himself." . . . A confession, in order to be admissible, must be free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, **however slight**, nor by the exertion of any improper influence.

Id. (emphasis added); see also Brady v. United States, 397 U.S. 742 (1970).

This court has reiterated this holding and rule on numerous occasions, consistently holding that confessions acquired through the use of inducements or promises are not voluntary and as such should not be admitted into evidence. See Hutto v. Ross, 429 U.S. 28, 97 S. Ct. 202, 50 L. Ed. 2d 194 (1976); Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); Haynes v. Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Crooker v. California, 357 U.S. 433, 78 S. Ct. 1287, 2 L. Ed 1448 (1958).

In Brady v. United States, 397 U.S. 742, 90 S. Ct., 25 L. Ed.2d 747 (1970), this Court reiterated the scrutiny that courts are to apply when analyzing a case where a suspect is not represented by counsel. In Brady, the prosecution promised the defendant a lesser sentence if he pleaded guilty, but the promise was made in the presence of the defendant's

attorney, while the defendant was not in custody. In holding that this promise did not render the subsequent confession inadmissible, the Court reiterated the principles of Bram:

> "Bram dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess."

Brady, 397 U.S. at 754.

In the present case, the Petitioner too was in custody, was alone, and was unrepresented by counsel. Moreover, the Petitioner was well-acquainted with the officers. As such, the heightened scrutiny of Bram should be applied to this case. In applying that standard, it becomes clear that the interrogators made several improper promises of beneficial treatment, which induced the Petitioner to make the incriminating statements. Therefore, these statements cannot be said to be voluntary, and hence should not have been admitted into evidence against the Petitioner.

The statements made by the police officers prior to Mr. Brown's confession were clearly promises of beneficial treatment in exchange for the confession. For example, Detective Zarzour stated:

> You need to tell us who did [pull the trigger] and we need to hear the whole story and be done with it and get this thing over with and clear it up, Greg, because it is putting the heat on everybody and you are going to get some heat on you, *but the degree of heat you're going to get is up to you Greg*. . .
>
> I don't think if I didn't pull the trigger, Greg, I don't think I would take the heat for it, buddy. To be truthfully honest with you. *It means a hell of a lot of difference in the court's eye who pulled the trigger, okay? I think it makes a lot of difference.*
>
> But if he did, we need to know about it and we need to straighten it up and clear it up right now as fast as we can. Because the longer we wait the tougher it is for everybody. . . .

App. 51-52. Detective Zarzour continued:

> "We have got to have – we have got to have you help yourself here, Buddy. Not us, you help yourself. And if you are honest with us and you come through this stuff – let's talk about it."
>
> "Okay. I know it's hard for you. I'm not going to say it is an easy task for you to do this, but what I'm telling you is the quicker we get this done, the better it is going to be for you. Okay?"

> "All the arrows are pointing toward Greg right now. And I don't think that's fair. No, that's not. I don't think that's fair at all. And I don't think - personally, I don't think Jerry (the victim) would have wanted it that way. I may be wrong."
>
> "And - I want to ask you something else. So much of the cat is out of the bag. I know we- we have got a lot of loose ends to tie up, things we are going to have to do. You have cooperated and I couldn't ask for anything, you know, and **like I said, that's what I'll do for you - we will go in and do the best we can do. I'm not a hard ass for people who cooperate, okay?" (emphasis added).**

App. 53-54

While it is true that these pre-confession statements were "exhortations to get him to tell the truth," they also clearly offer beneficial treatment in exchange for the "truth" the officers were seeking. Zarzour went much further than simply "making it clear to [Mr. Brown] that it was not their job to establish that he was not the triggerman and that [Mr. Brown] needed to tell them if he was not the triggerman" as the Court of Criminal Appeals stated. See Brown 698 So. 2d at 104; App. 69. Zarzour implied that if Mr. Brown quickly confessed, the "heat" on him would be lessened, the judge would look more favorably upon him, and Mr. Brown would be "better" off confessing than withholding the truth.

Not insignificantly, the majority of these express and implied promises of beneficial treatment immediately precede Mr. Brown's invocation of his right to counsel and his confession. Consequently, the only plausible conclusion to be drawn from these facts is that Mr. Brown's confession was induced by these express and implied promises of beneficial treatment. Accordingly, the confession should have been suppressed as having been obtained in violation of Mr. Brown's Fifth, Sixth and Fourteenth Amendment rights. Moreover, the courts below have misapplied clearly established precedent of this Court and Mr. Brown's petition for a writ of habeas corpus should be granted.

CONCLUSION

It is hereby respectfully requested, for the reasons stated above, that: (i) this Court issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit; (ii) issue a Writ of Habeas Corpus granting Gregory Brown relief from his unconstitutionally obtained conviction and sentence of life imprisonment without parole; and (iii) for other, further or more general relief as may be appropriate.

Respectfully submitted,

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APPENDIX

Petitioner's Appendix

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Gregory Allen Brown v. Joe S. Hopper, Commissioner of the Alabama Department of Corrections

No. 99-14139

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

March 29, 2001, Filed

Appeal from the United States District Court for the Northern District of Alabama

Before BIRCH and BLACK, Circuit Judges, and NESBITT*, District Judge.**

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.[1]

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* Honorable Lenore C. Nesbitt, U.S. District Judge for the Southern District of Florida, sitting by designation.

** Judge Nesbitt did not participate in this decision. This case is rendered by a quorum. See 28 U.S.C. § 46(d).

[1] 11th Cir. R. 36-1 provides: When the court determines that any of the following circumstances exist:

(a) the judgement of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) a summary judgement, directed verdict, or judgement on the pleadings is supported by the record;
(e) the judgement has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgement or order may be affirmed or enforced without opinion.

Gregory Allen Brown v. Joe S. Hopper, Commissioner of the Alabama Department of Corrections

No. 99-14139-F

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

April 21, 2000, Filed

Appeal from the United States District Court for the Northern District of Alabama

ORDER:

Appellant's motion for certificate of appealability is GRANTED on the following issue(s) only:

> Whether Brown's statements constituted a request for counsel that rendered his subsequent confession inadmissible and whether the law of the case doctrine precluded the admission of these statements on remand.

No certificate of appealability should issue on the remaining issues appellant raises, because he failed to make a substantial showing of the denial of a constitutional right, see 28 U.S.C. § 2253(c)(2).

/s/ STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

GREGORY ALLEN BROWN,

Petitioner,

v.

JOE S. HOPPER, COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

CIVIL ACTION NO. 97-B-0246-M

Entered Sept. 21, 1999

MEMORANDUM OPINION

Petitioner Gregory Allen Brown ("the petitioner") contests his 1991 capital murder conviction pursuant to 28 U.S.C. § 2254. A magistrate judge of this court reviewed the claims presented by the petitioner and recommended that the petition be denied. Counsel for the petitioner has filed a number of objections to the Report and Recommendation of the magistrate judge. Counsel asserts that the magistrate judge improperly concluded that (1) the petitioner did not invoke his right to counsel; (2) the petitioner's confession was not obtained following promises of beneficial treatment; and, (3) the petitioner's claim of insufficient evidence is procedurally barred. Upon careful con-

sideration of the record, the submissions of the parties, and the relevant law, this court is of the opinion that the Report and Recommendation of Magistrate Judge John E. Ott is due to be adopted and approved.

I. RIGHT TO COUNSEL

A. The Objections

The petitioner asserts that the magistrate judge mistakenly found that his inquiry, "Is it going to piss y'all off if I ask for my-to talk to a friend that is an attorney. . . ," was not an unambiguous request for counsel, mandating that the police discontinue the custodial questioning. In support of this claim, the petitioner asserts that the failure of the Alabama Court of Criminal Appeals to follow its earlier holding and the magistrate judge's independent review and conclusion that this statement was not an unambiguous request violates the law of the case doctrine. He also asserts that his inquiry was an invocation of his right to counsel. Therefore, the subsequent statement that was obtained by the law enforcement officers violated his Fifth, Sixth, and Fourteenth Amendment rights.

B. Pertinent Facts

The Alabama Court of Criminal Appeals on direct appeal of the petitioner's conviction found:

> In this case, the appellant's request to speak to a friend who is also an attorney was clearly an invocation of his right to counsel. Further interrogation by the investigators without providing the appellant the opportu-

> nity to confer with an attorney violated the appellant's Fifth Amendment rights as discussed in *Miranda* and *Edwards*.

Brown v. State, 630 So. 2d 481, 484 (Ala. Crim. App. 1993). The court reversed the petitioner's conviction and remanded the case for a new trial. The state's application for a rehearing and for a writ of certiorari were denied by the state courts.

The United States Supreme Court granted the state's petition for a writ of certiorari on October 3, 1994. The judgment was vacated and the case remanded to the Alabama Court of Criminal Appeals for further consideration in light of *Davis v. United States*, 512 U.S. 452 (1994). *Alabama v. Brown*, 513 U.S. 801 (1994). The Court of Criminal Appeals affirmed the petitioner's conviction on March 3, 1995. *Brown v. State*, 668 So. 2d 102 (Ala. Crim. App. 1995). Concerning the petitioner's statement that is the crux of this issue, the court held:

> This is certainly not an unambiguous request for counsel as required by *Davis*. Therefore, the appellant's assertion that his statements to the police should have been suppressed because, he says, they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), is without merit.

Brown, 668 So. 2d at 103. His application for rehearing was denied, as was his petition for a writ of certiorari. *Ex parte Brown*, 668 St 2d 105 (Ala. 1995).

C. Discussion

1. Law of the Case Doctrine

The petitioner contends that the statement by the Alabama Court of Criminal Appeals in its initial decision that petitioner's "request to speak to a friend who is also an attorney was clearly an invocation to his right to counsel" is the law of the case. He argues that the subsequent holdings by the Court of Criminal Appeals and the magistrate judge that this statement was an equivocal request for an attorney violated the law of the case doctrine. Generally, a "vacation by an appellate court of the lower court's judgment vacates the entire judgment below, divesting the lower court's earlier judgment of its binding effect." *United States v. M.C.C of Florida, Inc.*, 967 F.2d 1559, 1561 (11th Cir. 1992). However, a "vacation which merely requires further consideration in light of a new Supreme Court decision . . . is of a much more limited nature." *Id.* at 1562. The effect of such a vacation "was not to nullify all proceedings. On the contrary, it merely required the court to reconsider its opinion.. . in light of the new law set forth in [the new Supreme Court decision]." *Id.*

At the time of the initial decision of the Alabama Court of Criminal Appeals, the United States Supreme Court had yet to release its opinion in *Davis*. Under pre-*Davis* law, once an accused expressed his desire to communicate with the police through counsel, questioning of the accused must cease unless the accused subsequently initi-

ated further communication with the police. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). If the accused made an equivocal request for counsel, the police were required to clarify that request before any further questioning could take place. *Owen v. Alabama*, 849 F.2d 536, 539 (11thCir. 1988).

In its initial opinion, the Court of Criminal Appeals stated that "the appellant's request to speak to a friend who is also an attorney was clearly an invocation of his right to counsel." *Brown v. State*, 630 So. 2d 481, 484 (Ala. 1993) However, after the court made that statement, its discussion of this issue continued:

> The State argues in its brief that, "At most, the comments made by appellant could be considered an equivocal invocation of his right to counsel." However, even if we assumed that the appellant's request to speak to an attorney was equivocal or ambiguous, the failure of investigators to clarify his request to speak to his attorney still violates *Miranda*. . . . Contrary to the State's argument, we hold that at the very least the appellant's comment was an equivocal request to speak to counsel. Additionally, we conclude that the investigators did not clarify the appellant's request to confer with counsel. . . . Thus, regardless whether the appellant's request to speak to his friend who is an attorney is considered a clear request or is considered an equivocal request, the investigators' failure to respond to or to clarify that

> request nonetheless violated the appellant's Fifth Amendment rights.

Id. at 484-85.

Despite the previous statement that the request was "clearly an invocation of the right to counsel," it is clear in the context of the entire opinion that the Court of Criminal Appeals did not conclusively decide whether the request was equivocal or unequivocal. Instead of holding that the request was unequivocal, the court stated that no matter whether the request was equivocal or not, the accused's Fifth Amendment rights were violated. Thus, the distinction between whether the request was equivocal or unequivocal was not an important factor in the decision and, therefore, the court failed to conclusively make that distinction.

However, in its subsequent decision on remand from the United States Supreme Court, the Court of Criminal Appeals was directed to reconsider its opinion in light of the new Supreme Court decision in *Davis*. In *Davis*, the Supreme Court held that an accused must unequivocally request an attorney in order to require officers to cease their questioning of the accused. Davis, 512 U.S. at 459-60. An equivocal request does not require officers to cease questioning or further clarify the request of the accused. *Id.*

After the *Davis* decision, the question of whether the petitioner made an equivocal or unequivocal request for counsel became important. The Court of Criminal Appeals on remand was called upon to make a distinction which it had not been previously required to make. Because in its previous decision, the court had not conclusively decided whether the request was equivocal or unequivocal and new

Supreme Court law made such a distinction crucial, it was free to visit this question on remand. The law of the case doctrine did not preclude the Court of Criminal Appeals from deciding on remand whether the request of the petitioner for counsel was equivocal or unequivocal Therefore, the decision of the Court of Criminal Appeals and the magistrate judge did not violate the law of the case doctrine.

2. Actual Invocation of the Right to Counsel

As part and parcel of the first challenge, the petitioner also asserts that

> . . . the Magistrate Judge glosses over the fact that Detective Zarzour responded to Mr. Brown's request by stating, "Well, I understand that. I understand what you are saying." Instead, the Court indicated that "the record shows that immediately after the terse, ambiguous statement by the petitioner, lie began to explain his involvement in the crime."

(Doc. 29, p. 4).[1] The petitioner also claims that the magistrate judge's review further excludes the fact that the petitioner "did not explain his involvement in the crime until

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[1] The designation "Doc. 29" indicates the number assigned to the document when it was filed with the district court. The documents appear in the district court file in numerical order and the document number appears in the bottom right-hand corner on the first page of each document.

after Detective Zarzour stated that he understood [the petitioner's] request for counsel. And after Detective Braden proceeded to attempt to convince [the petitioner] that they already knew how he was involved in the crime and implied to Mr. Brown that his statement was a mere formality." (*Id.*, p. 5).

The Repōrt and Recommendation of the magistrate judge did not gloss over Detective Zarzour's reply to the petitioner. To the contrary, it was placed in context on pages 27 and 28 of the Report. Because so much is lost when statements are taken out of context, the court will again cite the pertinent portion of the recorded interview, as delineated by the magistrate judge:

> About one-third of the way through the interview, when the officers asked him [the petitioner] to go back through the events, the following occurred:
>
> Q (By Sgt. Braden) From the very start.
>
> Q (By Det. Zarzour) From the very start. From the time he gave you the letter–
>
> A [appellant] Okay.
>
> Q Go ahead.
>
> **A Is it going to piss y'all off if I ask for my–to talk to a friend that is an attorney. I mean, I'm going to do whatever I have got to do. Don't get me wrong.**

Q Well, I understand that I understand what you are saying.

A: You have got to realize, man, I'm . . . scared to death.

Q: Well, and rightfully so. I don't blame you one bit because there's a serious problem here, but if you didn't pull the trigger, then we need to know what exactly happened, okay?

Q (By Sgt. Braden): It's up to you, Greg, whatever you want to do. Like he said.

A Listen, I don't know exactly what happened. I was not there.

Q (By Det. Zarzour): Okay.

Q (By Sgt. Braden): We know you met--we know you met him over at Pick-a-Pack, we know y'all left, we know you brought him back. We know all that. We know where you were, we have got people that have seen you, we know. It's like I told you earlier, we already know.

Q (By Det. Zarzour) That's why I said don't beat around the bush, let's get to it and get it over with.

A All right. . . .

(Doc. 13, Ex. D, Tr. pp. 32-34)(emphasis added).

In *United States v. Mendoza-Cecelia*, 963 F.2d 1467 (11th Cir. 1992), the Eleventh Circuit faced a situation where a similar reference was made to an attorney by the defendant. The suspect's statement during questioning that "I don't know if I need a lawyer, maybe I should have one, but I don't know if it would do me any good at this point," was found to be an equivocal request for an attorney. *Id.* at 1472. The Eleventh Circuit held that the suspect's statement "clearly reveals that he was 'contemplating exercising his right to have an attorney present.' (citation omitted). Having indicated a 'possible desire' for an attorney, . . . [suspect] made a qualifying equivocal indication." Id. at 1472. In the present case, the petitioner's question of "[i]s it going to piss y'all off if I ask for my-to talk to a friend that is an attorney," is similarly an indication of a "possible desire" for an attorney and not an unequivocal request for one.

In *Coleman v. Singletary*, 30 F.3d 1420 (11th Cir. 1994), the defendant was being questioned for the murder of his sister by police detectives. During Coleman's tape-recorded confession (and after he was read his *Miranda* rights), a telephone call from a public defender interrupted the questioning. The detectives told Coleman that the public defender requested that they "cease any further interview at this time." The public defender informed an assistant state attorney that she intended to instruct Coleman not to answer any further questions. However, the assistant state attorney refused to allow the public defender to speak to Coleman on the phone and did not tell him that the public defender planned to instruct him not to answer any more questions. The officers then turned the tape recorder back on and the following exchange took place:

Q (by Det. Valente): "and what you're saying, or what you're about to say you're going to do of your own free will; is that correct?"

A(Coleman): "Yes. Unless, what about that one guy, though."

Q (by Det. Valente): "What guy?"

A (Coleman): "The guy--"

Q (by Det. Rigney): "Public defender"

A (Coleman): "Yeah."

Q (Det. Valente): "Okay."

Q (Det. Rigney): "I explained to him what the public defender was--"

Q (Det. Valente): "Okay. Tony, do you feel you want to have a public defender?"

A (Coleman): "I don't know. But if be said to stop it I don't want to do what he said not to do."

Q (By Det. Valente): "All right. Well, do you have any objections to talking to us? It's up to you. Now, again, you know what our job is. We need to know what happened, and that's basically it. But we don't want to do anything, we don't want to force you to do anything that you don't want to do. If you want to talk to [us], fine, we'll continue with the conversation. You can stop anytime you want to

> stop. You can ask us any questions but it's up to you. If you want to talk to us, we'll listen. If you want us to stop asking questions, we'll do that."
>
> A (Coleman): "I guess if that guy thinks its all right, I don't care."

Coleman argued that the trial court erred in admitting his statements made after this exchange took place because he made a request for an attorney. The court stated that Coleman's statement was "capable of equally plausible, differing interpretations." *Coleman*, 30 F.3d at 1425-26. The Eleventh Circuit, citing *Davis*, held that the trial court properly admitted the entire statement because it was an equivocal request for an attorney. *Id.* at 1426. In the present case, the petitioner's question of whether it would "piss y'all off if I ask for my-to talk to a friend that is an attorney," is similarly unclear as to whether he was requesting an attorney.

In the opinion of this court, the inquiry by the petitioner was not the unambiguous, unequivocal request that a law enforcement officer would have reasonably understood as an invocation of the right to counsel. Detective Zarzour's statement that he understands follows the petitioner's inquiry and the petitioner's statement, "I am going to do whatever I have got to do. Don't get me wrong." (*Id.*). Detective Braden then makes it clear to the petitioner that the decision to talk to the officers or to invoke his right to counsel is the petitioner's choice. At this point, the petitioner clearly has not invoked his right to counsel. He then decides to answer the officers' questions. Upon a review of the record, the Report and Recommendation, and the petitioner's objections, the court agrees with the magis-

trate judge that, after full consideration of the petitioner's inquiry, Detective Zarzour's and Detective Braden's comments, "the dynamics involved in custodial interrogations between the interrogator and the individual being questioned, and the context," the standard set forth in *Davis* has not been satisfied. (Doc. 19, p. 29).

II. PROMISES OF BENEFICIAL TREATMENT

The petitioner next asserts that the magistrate judge incorrectly concluded that the petitioner's confession was not the result or improper promises of beneficial treatment. (Doc. 29, p. 6). According to the petitioner, the magistrate judge misapplied the standard set forth in *Bram v. United States*, 168 U.S. 532, 542-43 (1897), that a confession cannot be obtained by "any direct or implied promises, however slight, nor by the exertion of any improper influence."

Contrary to the petitioner's assertions, the magistrate judge applied the correct standard in reviewing the voluntariness of his confession:

> Concerning the second claim, that his statements were prompted by unlawful inducements and actions, and therefore involuntary (citation omitted), the clearly established Supreme Court precedent requires an inquiry into whether, under the totality of the circumstances, the confession was voluntarily obtained by the police or whether it was improperly obtained through the use of any direct or implied promises or the exertion of

> any improper influence that rendered it involuntary . . .

(Doc. 19, p. 20)(citations omitted).

Reviewing the transcript of the interview, particularly the portions quoted by counsel for the petitioner in the objections, the court finds that the petitioner's statements were knowingly, voluntarily, and intelligently made. The actions and comments of the detectives in this case did not violate the petitioner's Fifth, Sixth, and Fourteenth Amendment rights as alleged.

III. SUFFICIENCY OF THE EVIDENCE

Lastly, the petitioner asserts that the magistrate judge incorrectly found that his challenge to the sufficiency of the evidence was procedurally barred for failure to raise the claim in state court. (Doc. 29, p. 9). He asserts, contrary to the magistrate judge's finding, that this claim was raised on direct appeal. The court does not agree.

"Exhaustion of state remedies requires that the state prisoner 'fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'" *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998), *cert. denied*__ U.S.__, 119 S. Ct. 405 (citing *Duncan v. Henry*, 513 U.S. 364, 365 (1995)). The petitioner must make the state court aware of the particular federal constitutional issue. *Snowden*, 135 F.3d at 735.

On direct appeal, the petitioner presented two specific issues:

I. Is the admission of a confession obtained from a defendant in custody, after he has requested an attorney and the request disregarded, a violation of both the Fifth and Sixth Amendments to the United States Constitution so as to require a reversal of a conviction obtained thereby?

II. Is the admission of a confession obtained following promises of beneficial treatment to the accused by interrogating officers a violation of the Alabama Constitution and the United States Constitution so as to require a reversal of a conviction obtained thereby?

(Doc. 13, Ex. D, p. 2). Both issues clearly challenged the admissibility of the confession on constitutional grounds. One sentence in the argument portion of the brief states, "[i]t cannot be seriously disputed that all, or at least practically all, of the State's evidence which tended to directly connect the appellant Brown to the death of Jerry Callahan was furnished by a transcribed and videotaped statement which was extracted from the appellant by police detectives from the city of Hoover, Alabama, after he had been taken into custody at the jail of that city." (Doc. 13, Ex. D, p. 5). This statement is not the sufficient presentation of the federal constitutional claim to the state courts that is required.[2]

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[2] In reaching this conclusion, the court notes that the same statement is found in the petitioner's application for a rehearing when the Court of Criminal Appeals affirmed his conviction on remand. (*See* Doc. 13, Ex.

(continued...)

Even were this claim properly before the court, the petitioner would not be entitled to any relief. Contrary to the petitioner's assertion, the magistrate judge did not erroneously consider the petitioner's confession in assessing the sufficiency of the evidence. The confession was properly considered by the magistrate judge as it constituted admissible evidence of the petitioner's guilt. Further, reviewing the claim under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979), the court also concludes the petitioner is not entitled to relief.

IV. CONCLUSION

The court has considered the entire file in this action, including the Magistrate Judge's Report and Recommendation, and the objections of the petitioner and has reached an independent conclusion that the Report and Recommendation is due to he adopted and approved. The court hereby adopts and approves the findings and recommendation of the magistrate judge as the findings and conclusions of the court. The petition for writ of habeas corpus is due to be dismissed. An Order in accordance with this Memorandum Opinion will be entered contemporaneously herewith.

DONE this 21st day of September , 1999.
Sharon Lovelace Blackburn
United States District Judge

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[2] (...continued)
L, p. 5). Counsel for the petitioner further asserts, and the court assumes for purposes of this review, that the statement was also similarly referenced in his petition for a writ of certiorari. This assumption is necessary as the record does not include the petitioner's brief, but only the petition, which does not include the statement. (*See* Doc. 13, Ex. M).

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION**

GREGORY ALLEN BROWN,

Petitioner,

v.

JOE S. HOPPER, COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

CIVIL ACTION NO. 97-B-0246-M

Entered Feb. 25, 1999

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Gregory Allen Brown, with the assistance of counsel, filed a petition for writ of habeas corpus with this court on January 31, 1991. He challenges the validity of his 1991 conviction in the Circuit Court of Jefferson County on a charge of capital murder. In accordance with the usual practices of this court, the petition was referred to a magistrate judge for a preliminary review and recommendation.

In response to an order to show cause why the relief requested by the petitioner should not be granted, the re-

spondent filed a motion to dismiss wherein they request that the petition he dismissed as it was barred by the Antiterrorism and Effective Death Penalty Act (AEDPA). (Doct. 7). The petitioner filed a response to the motion. (Doct. 10). The motion was denied and the respondent was required to submit an answer. (Doct 11). The court informed the petitioner of his right to dispute any facts asserted in any answer the respondent may submit by filing a sworn response to the answer. (Doct. 11, p. 6). The answer was filed September 15, 1997. (Doct. 13).

By order of the court, the parties were notified that the court deemed the case ripe for summary disposition. The petitioner was informed of his right to file affidavits or other materials to show why the petition should not be summarily denied or dismissed on the basis of the answer and record. (Doct. 15). Counsel for the petitioner filed a response to the order. (Doct. 18).

I. PROCEDURAL HISTORY

Petitioner was charged in an indictment with two counts of capital murder. His counsel filed a motion to suppress his statement to the police. A hearing on the motion was held by the trial court on September 3, 1991. The motion to suppress was denied on September 13, 1991. (Doct. 13, Ex. C, p. 2). He was convicted after a jury trial in Jefferson County Circuit Court on September 20, 1991. (Doct. 3, Ex. A, p. 1834). He was sentenced to life imprisonment without the possibility of parole on November 1, 1991, as recommended by the jury. (*Id.* at p. 5). A timely notice of appeal was filed. On appeal, the petitioner asserted that (1) the admission of his confession at trial violated the Fifth and Sixth Amendments and (2) the admis-

sion of his confession was in error because it was obtained upon promises of beneficial treatment. (Doct. 13, Ex. D, p. 2). The Alabama Court of Criminal Appeals reversed the petitioner's conviction and remanded the case for a new trial in a published opinion on August 13, 1993. *Brown v. State*, 630 So. 2d 481 (Ala. Cr. App. 1993). The State's application for a rehearing was denied on September 30, 1993. The State's petition to the Alabama Supreme Court for a writ of certiorari was also denied.

The United States Supreme Court granted the State's petition for a writ of certiorari on October 3, 1994. The judgment was vacated and the case remanded to the Alabama Court of Criminal Appeals for further consideration in light of *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) (Doct. 13, Ex. K). The Court of Criminal Appeals affirmed the petitioner's conviction on March 3, 1995. *Brown v. State*, 668 So.2d 102 (Ala. Crim. App. 1995). His application for rehearing was denied on May 5, 1995. The Alabama Supreme Court denied his petition for a writ of certiorari on September 15, 1995. *Brown v. State*, 668 So. 2d 1052 (Ala. 1995).

The present petition for habeas corpus relief was filed on January 31, 1997. He claims that (1) his conviction is improperly premised solely on the basis of an illegal confession, (2) his confession was unconstitutionally obtained after he asserted his right to counsel, and (3) his confession was improperly obtained as is a result of improper promises of beneficial treatment (Doct. 1). The respondents assert that his first challenge to the sufficiency of the evidence is procedurally barred and that the remaining challenges are due to be denied as the State courts

properly applied the applicable Supreme Court case law. (Doct. 13, pp. 7, 17).

II. PROCEDURAL DEFAULT

A. Generally

The federal courts' authority to review state court criminal convictions is severely restricted when the petitioner has failed to present the claims in state court or when he fails to follow applicable state procedural rules. *Teague v. Lane*, 489 U.S. 288, 297-98 (1989); *Johnson v. Singletary*, 938 P.2d 1166, 1173 (11th Cir. 1991), *cert. denied,* 506 U.S. 930, 113 8. Ct. 361, 121 L. Ed. 2d 274 (1992). "[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971).

There are only two exceptions that allow this court to review the merits of a claim that has been procedurally defaulted. First, the petitioner must demonstrate both cause excusing the default and actual prejudice resulting from the bar. Second, in extraordinary cases, a federal court may grant the writ without a showing of cause and prejudice to correct "a fundamental miscarriage of justice." *Hill v. Jones,* 81 F.3d 1015, 1022-23 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 967 (1997). Under the latter exception, the petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Hill*, 81 F.3d at 1023, *citing Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Sims v. Singletary,* 155 F.2d 1997, 1311 (11th Cir. 1998).

B. Petitioner's First Claim is Procedurally Barred

The respondent asserts that to the extent the petitioner now claims that the evidence was insufficient to support his conviction, it is procedurally barred. They are correct. First, he did not raise this claim on direct appeal. Second, even if he were to file a Rule 32 petition raising this claim, it would be due to be dismissed as having been filed outside the applicable limitations period under Rule 32.2(c).[1] Third, any Rule 32 petition challenging the sufficiency of the evidence would be barred under Rule 32.2(a)(5)[2] since this issue could have been but was not raised on

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[1] Rule 32.2(c) of the Alabama Rules of Criminal Procedure provides in pertinent part:

> [T]he court shall not entertain any petition for relief from a conviction or sentence unless the petition is filed: (1) In the case of a conviction appealed to the court of Criminal appeals, within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals ...; or (2) In the case of a conviction not appealed to the Court of Criminal Appeals, within two (2) years after the time for filing an appeal lapses. The court shall not entertain a petition ... unless the petition is filed within the applicable two-year period ... or within six (6) months after the discovery of the newly discovered material facts, whichever is later ...

[2] Rule 32.2(a)(5) of the Alabama Rules of Criminal Procedure provides:

> (a) **Preclusion of Grounds.** A petitioner will not be given relief under this rule based upon any ground:
>
> ....
>
> (5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.l(b) [lack of jurisdiction].

appeal. *Shoulders v. State*, 703 So. 2d 1015, 1017 (Ala. Crim. App. 1997)

This court is not required to dismiss this claim as unexhausted because the default is apparent and it would be futile to send the petitioner back to state court only to be faced with the default. *Collier v. Jones,* 910 F.2d 770 (11th Cir. 1590); *Widdon v. Dugger*, 894 F.2d 1266 (11th Cir.), *cert. denied*, 493 U.S. 834 (1990).

Petitioner's claims may only be reviewed if he can show "'cause and prejudice' for his procedural default or that he is 'actually innocent.'" *Sims*, 155 F.3d at 1311. If the petitioner fails to show cause for the default, it is not necessary to consider whether he also suffered actual prejudice under the first exception. *Engle v. Isaac*, 456 U.S. 107, 134 n.43, 102 S. Ct. 1553, 71 L. Ed. 2d 783 (1982).

C. The Cause and Prejudice Exception

Despite being afforded the opportunity, the petitioner has failed to demonstrate cause for his default. In his only statement on this aspect, he asserts "that this issue logically flows front the bigger issue of the admissibility of the petitioner's statement." (Doct. 18, p. 2). This is not sufficient. Because this claim was not adequately presented in the state courts, it may not be reviewed unless there is a further showing of actual innocence.

D. The Fundamental Miscarriage of Justice Exception

Upon a review of the entire record, particularly the trial transcript, the court finds that the petitioner has not demonstrated that "a fundamental miscarriage of justice" occurred in this case. *Hill*, 81 F.3d at 1023. As will be discussed herein, the record does not support a conclusion that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* To the contrary, the evidence adduced at trial and the record on appeal and before this court conclusively establish the petitioner's guilt. Accordingly, the petitioner's challenge to the sufficiency of the evidence is procedurally barred from review by this court.[3]

III. THE FACTS OF THE OFFENSE OF CONVICTION

The facts underlying petitioner's conviction were set out in detail in the opinion of the Alabama Court of Crimi-

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[3] Even were this court to address the petitioner's insufficiency of the evidence claim on the merits, it would be due to be denied. The case that would govern the petitioner's challenge to the evidence is *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2761, 61 L. Ed. 2d 560 (1979). In Jackson, the court held that the issue is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. The petitioner is entitled to relief only if it is shown that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 224. The evidence adduced at trial, outlined in the State appeal, and quoted below, clearly established the petitioner's guilt. The petitioner in no way approaches the *Jackson* standard for relief.

nal Appeals and are supported by the record. The court found that the evidence established:

> Jerry Wayne Callahan, the victim, was the owner of a wholesale diamond business and owned a 90% interest in Riverchase Jewelers, a jewelry store in Jefferson County, Alabama. The evidence tended to show that the businesses owned by Callahan were in serious financial trouble. The appellant owed approximately $1,100,000 on notes secured by the businesses, which he told witnesses he could not pay.
>
> The appellant (the petitioner herein) was a friend of Callahan's and became acquainted with him through gambling ventures. The appellant was the dealer in high stakes card games in which Callahan participated. Witnesses for the State testified that the appellant and Callahan had participated in a card game on the night of February 6, 1991, and that Callahan had won $15,000. The following day, February 7, 1991, the appellant paid Callahan $9,000 of the money that he had won at the card game.
>
> Pat Costello, who owned the remaining 10% Interest in Riverchase Jewelers, testified that Callahan had been upset over his financial situation and that he once commented that he would be better off dead. He testified that Callahan did not come into the store on February 7, 1991, the day of

Callahan's death. He said that on that day the appellant had come to the store twice, once to pick up a large diamond ring, the appraised value of which was $15,000, and the next time to pick up paper-work regarding the ring. According to Costello, Callahan had instructed him to give the appellant these items and the appellant did not pay for the ring.

A neighbor who lived near Callahan testified that between 2:30 and 4:00 p.m., he heard a knock on his door. When he opened the door, he saw an individual, who he described as being the approximate height and weight of Robert Gospodareck, a codefendant in this case, walking down the stairs. Another neighbor testified that between 3:00 and 4:00 in the afternoon of February 7, 1991, she heard a loud "bang". On that same day, a woman who had occasionally dated Callahan discovered his body in his apartment. Callahan had been shot once through the heart.

Jerry Noto, the owner of a local convenience store, testified that the appellant had been in his store on two times on the day of Callahan's death. The first time the appellant came into the store, he was displaying the diamond ring. According to Note, the appellant left the store and returned with Gospodareck. Witnesses testified that the appellant and Gospodareck

were at the store between 4:30 and 5:00 on the afternoon of the killing. According to the witnesses, the appellant talked with Gospodareck for a short while and then Gospodareck left the store. Noto testified that the appellant appeared nervous. Testimony established that Callahan's apartment was near Noto's store.

During their investigation of Callahan's death, investigators with the Hoover Police Department, Detective Peyton Zarzour and Sergeant Edward Braden, received information that the appellant was involved in the card game that took place the night before Callahan's death. The investigators contacted the appellant by telephone to arrange a meeting with him at the Hoover Police Department to discuss their investigation. The Appellant agreed to meet with the investigators. As the time of the meeting approached, the investigators were watching the appellant's home. The investigators saw the appellant load his vehicle with luggage and boxes. The appellant then got into his vehicle and drove toward Fultondale, Alabama, in the opposite direction of the Hoover Police Department. The investigators suspected that the appellant was attempting to leave town without meeting with them and they asked Gardendale police officers to stop the appellant's vehicle. Once they stopped the vehicle, the Gardendale police called the investigators to the scene. The

appellant assured them that he still planned to meet with them as he had cold them earlier he would.

Zarzour, without entering the vehicle, saw a .45 caliber handgun inside the appellant's vehicle. The appellant told the investigator that Callahan had given him the gun. The appellant then told the investigators that he had a letter that would explain everything. The appellant permitted the investigators to enter his car and get the letter. The letter was handwritten and stated:

> "I, Jerry W. Callahan, being of sound mind and body, do state that it is my wish that if certain parties are arrested for causing my death I do not wish for their prosecution. This party has enabled me to leave this life with some form of dignity and self respect. My deteriorating condition and the nonexisting chance of any survival have lead me to call on my friend for the ultimate act of friendship. Dr. Charles Clark of St. Vincent and Dr. Zeiger of Carraway can and will attest to my poor chance of any kind of decent existence in my last weeks. I did not want my family to

> live with the stigma that I took my own life coupled with the fact they didn't know of my condition. Please know that this act was done in the manner that I chose, which would cause myself and the above mentioned party the least amount of suffering."

The note was signed by Callahan. At trial, a handwriting analyst testified that in his opinion the note was written by Callahan.

The appellant was then read his Miranda rights, was placed under arrest, and was taken to the Hoover police station. The appellant was again read his Miranda rights before any statements were taken. The appellant indicated that he understood his rights, and he signed a waiver of rights form and a consent to search form. The appellant's statement was videotaped. After the appellant made his videotaped statement, he made a written statement. In his statements, the appellant explained his participation in the offense arid implicated Gospodareck in the shooting of Callahan.

A forensics expert testified that an autopsy on Callahan did not reveal any life threatening illness that would, in the near

> future, cause Callahan's death. Also, the testimony reflected that the doctors named in Callahan's note had not treated Callahan for any life threatening illness.

Brown, 630 So. 2d at 482-83.

IV. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

A. The Applicable Standard of Review - Generally

The petitioner filed his petition after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Therefore, the provisions of AEDPA are applicable to his claims. *Lindh v. Murphy,* 531 U.S. 320, 117 S. Ct., 2059, 138 L. Ed. 3d 481 (1997). AEDPA amends 28 U.S.C. § 2254(d) by establishing a more deferential standard for reviewing state court adjudications. *Fugate v. Turpin*, 8 F. Supp. 2d 1383 (M.D. Ga. 1998) . The amendments to subsection (d) provide:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not he granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of,

> clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The act prohibits "federal courts from granting habeas relief for claims previously adjudicated by state courts, unless the state court adjudication was contrary to or represented an unreasonable application of 'clearly established' federal law at the relevant time as determined by the Supreme Court of the United States" or was an unreasonable determination of the facts in view of the evidence presented in the State court. *Neelley v. Nagle*, 138 F.3d 917, 922 (11th Cir. 1998), *cert. denied*, __ U.S. __, 1999 WL 8147 (Jan. 11, 1999).

In *Neelley,* the Eleventh Circuit examined the new, more deferential standard laid out in subdivision § 2254 (d), and concluded:

> [A] court evaluating a habeas petition under § 2254 (d) (1) must engage in a three-step process: First, the court must "survey the legal landscape," . . . , to ascertain the federal law applicable to the petitioner's claim that is "clearly established" by the Supreme Court at the time of the state court's adjudication. Second, the court must determine whether the state court adjudication was contrary to the clearly established Supreme Court case law, either because the state court failed to apply the proper Supreme Court

> precedent, or because the state court reached a different conclusion based on substantially similar facts. If the state court's decision is not contrary to law, the reviewing court must then determine whether the state court unreasonably applied the relevant Supreme Court authority. The state court decision must stand unless it is not debatable among reasonable jurists that the result of which the petitioner complains is incorrect.

Fugate, 8 F. Supp. 2d at 1386, citing *Neelley*, 128 F.3d at 924-25.

1. The "Contrary To" Provision

After determining the "clearly established" law, the reviewing court must evaluate whether the claim presented is solely a question of law, a mixed question of law and. fact, or solely a question of fact. *Bowles v. Barge*, 999 F. Supp. 1247, 1254 (E.D. Wis. 1998). The "contrary to" clause of subsection (d) (1) applies solely to questions of law. In *Neelley*, the court stated:

> [w]e can readily think of two situations in which a state court decision would be "contrary to" clearly established Supreme Court case law. The first is when a state court faces a set of facts that is essentially the same as those the Supreme Court has faced earlier, but given these facts the state court reaches a different legal conclusion than that of the Supreme Court. A second situation is one in which a state court, in contravention

> of Supreme Court case law, fails to apply the correct legal principles to decide a case. Such a result would be "contrary" in the sense that the state court has not adjudicated the claim in the manner prescribed by the Supreme Court.

Neelley, 338 F.3d at 923. The contrary to "provision" requires the federal courts 'to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, hut when the state court addresses a legal question, it is the law as determined by the Supreme Court of the United States that prevails. *Bowles*, 999 F. Supp. 1254.

2. The "Unreasonable Application" Clause

"By its very language, [the second clause of subsection (d)(i),] 'unreasonable application,' refers to mixed questions of law and fact when a state court has 'unreasonably' applied clear Supreme Court precedent to the facts of a given case." *Neelley,* 138 F.3d at 924. "Mixed constitutional questions of law and fact are those decisions 'which require the application of a legal standard to the historical-fact determinations.'" *Bowles,* 999 F. Supp. at 1255, citing *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). It is not enough that the reviewing court disagrees with the state court decision. Relief may he granted "only if a state court decision is so clearly incorrect that it would not he debatable among reasonable jurists." *Neelley,* 138 F.3d at 924, *citing Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1114, 137 L. Ed. 2d 315 (1997), superseded on other grounds by statute, as stated in *Shute v. Texas*, 117 F. 3d

233 (5th Cir. 1997). *See also Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.) (In determining whether a state court's application of Supreme Court case law was reasonable, a federal court must assess whether the determination was minimally consistent with the facts and circumstances of the case), *cert. denied*, __ U.S. __, 118 S. Ct. 72, 139 L. Ed. 2d 32 (1997).

3. Factual Determinations

Factual determinations made by the state court are presumed to be correct unless the petitioner rebuts the asssumption by clear and convincing evidence. Specifically, AEDPA provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e).

B. Summary

In sum, the standards governing this court's review of petitioner's claims include:

> First, under subdivision (a), factual determinations made by a state court are presumed correct, and that presumption can only be overcome by the petitioner presenting clear and convincing evidence that the factual determination was erroneous. Second, under subdivision (d), any claim decided on the merits in a state court proceeding cannot

> form the basis for federal habeas relief unless the state court ruling fails the analysis laid out in *Neelley*.

Fugate, 8 F. Supp. 2d at 1386.

V. APPLICATION OF THE PRESUMPTION OF CORRECTNESS OF FACTUAL DETERMINATIONS

The first matter that must be considered in reviewing petitioner's contentions is the applicability and extent of the presumption created by § 2254 (e) (1). Prior to the passage of the new subsection (e), the former subsection (d) enumerated the presumption of correctness to he applied to state court factual determinations in federal habeas corpus proceedings.[4] In *Miller v. Fenton*, 474 U.S. 104, 105 S. Ct.

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[4] The former subsection (d) provided:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and die State or an officer or agent thereof were parties, evidenced by a written reliable, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admits.
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter

(continued...)

445, 88 L. Ed. 2d 405 (1985), the Supreme Court considered the applicabi1ity of the presumption created by the former subsection (d) in a matter involving the voluntariness of a confession. The Court stated that uthe ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the recçuirernents of the Constitution is a matter for independent federal determination" in a habeas corpus proceeding under § 2254. *Miller,* 474 U.S. at 112. However, the Court stated:

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[4] (...continued)

> or over the person of the applicant in the State court proceeding;
> (5) that the applicant was an in and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

> [S]ubsidiary questions, such as the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the Miranda warnings, often require the resolution of conflicting testimony of police and defendant. The law is therefore clear that state-court findings on such matters are conclusive on the habeas court if fairly supported in the record and if the other circumstances enumerated in § 2254(d) are inapplicable.

Miller, 474 U.S. at 117.

This court believes that AEDPA does not require a different conclusion. However, in this case, the petitioner does not contest the historical facts surrounding the interrogation. *See* Doct. 18, p. 3.[5] The determination of the substantive issues concerning the petitioner's statements will be reviewed as legal questions, meriting independent, consideration under the new standards in § 2254 (d).

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[5] Counsel challenges the state court's application of the law to the facts. The court does note that in the petitioner's response (Doct. 18, p. 1), counsel asserts that this court ought to hold an evidentiary hearing to determine all the factual issues; however, a fair reading of all the Petitioner's submissions shows he is contesting the state court's legal determinations. To the extent the petitioner is challenging the historical facts in this matter, the court specifically finds that the petitioner has not shown by "clear and convincing" evidence that the facts as reported by the *Alabama Court of Criminal Appeals* are not correct, 28 USC. § 2254(c)(1).

VI. APPLICATION OF THE CONTROLLING STANDARDS AND DETERMINING THE ADMISSIBILITY OF THE PETITIONER'S CONFESSION

A. The Petitioner's Claims

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty or property, without due process of law." U.S. Const. Amend. XIV. The due process protections include "the Fifth Amendment privilege against compulsory self-incrimination." *Colorado v. Connelly,* 479 U.S. 157, 107 S. Ct. 515, 92 L. Ed. 2d 473 (1986) . The petitioner similarly is protected by the Sixth Amendment provision requiring the assistance of counsel. The petitioner alleges that his confession was improperly admitted as it was (1) unlawfully obtained after he invoked his right to counsel and (2) after he was promised beneficial treatment if he made a statement. (Doct. 1, pp. 7-16)

B. The "Clearly Established Federal Law"

The first step in the present inquiry is to delineate the applicable "clearly established federal law as determined by the Supreme Court." *Neelley*, 138 F.3d at 925. The case that governs petitioner's first claim, concerning his purported invocation of his right cc counsel, is *Davis v. United States,* 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

Concerning the second claim, that his statements were prompted by unlawful inducements and actions, and therefore involuntary (doct. 1, p. 16) , the clearly established Supreme Court precedent requires an inquiry into whether, under the totality of the circumstances, the confession was voluntarily obtained by the police or whether it was improperly obtained through the use of any direct or implied promises or the exertion of any improper influence that rendered it involuntary. *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *Bram v. United States*, 168 U.S. 532, 543, 18 S. Ct. 183, 42 L. Ed. 26 568 (1897). *See also Hutto v. Ross*, 429 U.S. 28, 30, 97 S. Ct. 202, 50 L. Ed. 2d 194 (1976); *Brady v. United States*, 397 U.S. 742, 753, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *Haynes v. Washington*, 273 U.S. 503, 513-14, 83 S. Ct. 1236, 10 L. Ed. 2d S12 (1963).

To be admissible, the confession must be freely and voluntarily made. *Bram*, 168 U.S. at 542. Law enforcement officials may not obtain a confession by overbearing an individual's freewill. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); *Mincey v. Arizona*, 437 U.S. 385, 399, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); *Haynes*, 273 U.S. at 513-14; *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 238 (1992); *Culombe v. Connecticut*, 367 U.S. 568, 601-02, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961). The factors to be considered include the conduct of law enforcement officials in creating pressure and the individual's capacity to resist that pressure. *Colorado v. Connelly*, 419 U.S. 157, 170-71, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986); *Fare v. Michael C.*,

442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979); *Nincey*, 437 U.S. at 399-401; *Davis v. North Carolina*, 284 U.S. 737, 752, 86 S. Ct. 1751, 16 L. Ed. 2d 895 (1966). "No single fact is dispositive." *Brown v. Illinois*, 422 U.S. 590, 603, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). Although the Alabama Court of Criminal Appeals did not cite the foregoing authorities in its opinion, the court applied the appropriate criteria.[6]

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[6] Citing an Alabama case, the court stated:

> "Extrajudicial confessions are prima facie involuntary and inadmissible as evidence; the burden is on the state to show voluntariness and a *Miranda* predicate in order for such confessions to be admitted into evidence, *Lewis v. State*, 535 So. 2d 228 (Ala. 1988). In order for a confession to he admitted into evidence it cannot be the result of any direct or implied, however slight. *Goodson v. State*, 540 So 2d 789 (Ala. Cr. App.), *cert denied*, 540 So. 2d 789 (Ala. 1989). Whether there was a voluntary and knowing waiver of *Miranda* rights under be decided from the particular facts and circumstances case, including the background, experience, and conduct of the accused--the totality of the circumstances. *Lewis v State*; 535 So. 2d 228; *Magwood v. State*, 494 So. 2d 124 (Ma. Cr. App. 19S5), aff'd. 494 So. 2d 154 (Ala.), *cert. denied*, 479 U.S. 955, 1995, [107 S. Ct. 599, 93 L Ed. 2d 599] (1986).
>
> "'The true test of voluntariness of extra-judicial confessions is whether, under all surrounding circumstances, they have been induced by a threat or a promise, express or implied, operating to produce in the mind of the prisoner apprehension of harm or hope of favor; such confessions must be excluded from the consideration of the duty as having been secured by undue influence."
>
> "*Ex parte Weeks*, 531 So. 2d 643, 644 (Ala. 1988), quoting *Womack v. State*, 281 Ala. 499, 205 So. 2d 579 (1967). The question of whether a confession is voluntary is initially to

(continued...)

C. "Contrary To" or an "Unreasonable Application"

Next, this court mast decide whether the state court determination was contrary to or an unreasonable application of federal law. In order to accomplish this, the court must examine the facts in light, of the clearly established federal law.

1. Right to Counsel

The Supreme Court in *Edwards v. Arizona,* 451 U.S. 477, 68 L. Ed. 2d 278, 101 S. Ct. 1880 (1981), "held that law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation." *Davis*, 129 L. Ed. 2d at 368. When the petitioner's case was presented to the Alabama Court of Criminal Appeals, the court, relying on *Edwards,* held:

> In this case, the appellant's request to speak to a friend who is also an attorney was clearly an invocation of his right to counsel.

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[6] (...continued)

be determined by the trial court, and thereafter the voluntariness as affecting the credibility and weight to be given any statement that an accused has made is a determination for the jury. *Lewis v. State*; *Ex parte Singleton* 465 So. 2d 443 (Ala. 1985). The trial court need only he convinced from a preponderance of the evidence to find a confession to have been voluntarily made. *Ex parte McCary*, 528 So. 2d 1133 (Ala. 1988); *Ex parte Singleton*."

Brown, 668 So.2d at 104.

Further interrogation by the investigators without providing the appellant the opportunity to confer with an attorney violated the appellant's Fifth Amendment rights as discussed in *Miranda and Edwards*.

. . . .

Contrary to the State's argument, we hold that at the very least the appellant's comment was an equivocal request to speak to counsel. Additionally, we conclude that the investigators did not clarify the appellant's request to confer with counsel. Rather, the investigators continued their interrogation as if the request to speak with counsel had not been made, telling the appellant how serious the matter wasp prodding him to provide more information, and ignoring the requirement that their inquiries after the appellant's request was made be specifically limited to clarifying that request. Thus, regardless whether the appellant's request to speak to his friend who is an attorney is considered a clear request or is considered an equivocal request, the investigators' failure to respond to or to clarify that request nonetheless violated the appellant's Fifth Amendment rights.

Because the appellant's statements were obtained in violation of his Fifth Amendment rights, the statements obtained

> after his invocation of his right to confer with counsel were due to be suppressed.

Brown, 630 So.2d at 454. Following the Court of Criminal Appeals' decision, the United States Supreme Court decided *Davis*. The *Davis* Court refused to extend *Edwards'* requirement that. questioning cease to situations where there is an ambiguous or equivocal reference to an attorney. *Id.* at 460. The Court stated:

> The applicability of the "'rigid' prophylactic rule" of Edwards requires courts to "determine whether the accused actually invoked his right to counsel." *Smith v. Illinois, supra*, 469 U.S. at 95, 105 S. Ct. at 492 (emphasis added), quoting *Fare v. Michael C.*, 442 U.S. 707, 719, 99 S. Ct. 2560, 2565, 61 L. Ed. 26 197 (1979). To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. *See Connecticut v. Barrett, supra,* 479 U.S. at 529, 107 S. Ct. at 832. Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil v. Wisconsin,* 501 U.S. at 178, 111 S. Ct. at 2209. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of ques-

tioning. *See ibid.* ("[T]he likelihood that a suspect would wish counsel to be present is not the test for applicability of Edwards"); *Edwards v. Arizona*, *supra*, 451 U.S. at: 485, 101 S. Ct. at 1855 (impermissible for authorities "to reinterrogate an accused in custody if he has clearly asserted his right to counsel") (emphasis added)

Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." *Smith v. Illinois*, 469 U.S. at 97-98, 105 S. Ct. at 494 (brackets and internal quotation marks omitted). If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect *See Moran v. Burbine*, 475 U.S. 412, 433 n.4, 106 S. Ct. 1135, 1147 n.4, 89 L. Ed 2d 410 (1986) ("[T]he interrogation must cease until an attorney is present only [i]f the individual states that he wants an attorney") (citations and internal quotation marks omitted).

We decline petitioner's invitation to extend *Edwards* and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. *See Arizona v. Roberson*, *supra*, 486 U.S. at 588, 108 S. Ct. at 2101-2102 (Kennedy, J., dissenting) ("the rule of *Edwards* is our rule,

> not a constitutional command; and it is our obligation to justify its expansion") . . . .

Davis, 512 U.S. at 459-60. On remand, the Alabama Court of Criminal Appeals reviewed the facts in light of Davis and held:

> In this case, the appellant asked the officers "Is it going to piss y'all off if I ask for my--to talk to a friend that is an attorney? I mean, I'm going to do whatever I have got to do. Don't yet me wrong." This is certainly not an unambiguous request for counsel as required by *Davis*. Therefore, the appellant's assertion that his statements to the police should have been suppressed because, he says, they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), is without merit.

Brown, 668 So. 2d 104. It is this decision that the court must review.

The facts before this court establish that Sergeant Braden of the Hoover Police Department was able to contact the petitioner over the phone to arrange a meeting at the Hoover Police Department for 4:00 p.m that day. (Doct. 13, Ex. C., Tr. pp. 24-26). The petitioner told Braden that he would be there at that time since he had to pick up his grandmother first. (*Id.*, p. 26). The officers set up a surveillance. They observed the petitioner at the resi-

dence loading a car with luggage and boxes. (*Id.*, p. 29). When he left in a direction away from Hoover, the officers requested local assistance and had the petitioner stopped.[7] Officer Braden observed a .45 caliber gun inside the car. The petitioner stated that Callahan had given the gun to him and that there was a letter in the car that would explain everything. (*Id.*, p. 35).

The petitioner was advised of his rights at the location where he was stopped and arrested. (*Id.*, p. 39). He was transported to the Hoover Police Department. He was again advised of his rights. After he was read his rights again and they were explained to him at about 5:51 p.m., he acknowledged that he understood them and signed the waiver form. (*Id.*, pp. 44-45, State's Ex. 4; Doct. 13, Ex. D, Tr. p. 2) . He also executed a consent to search form for his car about the same time that he was advised of his rights. (Doct. 13, Ex. C, pp. 45-46, State's Ex. 4; Doct. 13, Ex. D, Tr. p. 2) . The questioning of the petitioner commenced immediately thereafter. About one-third of the way through the interview, when the officers asked him to go back through the events, the following occurred:

> Q (By Sgt. Braden): From the very start.
>
> Q (By Det. Zarzour): From the very start. From the time he gave you the letter--

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[7] According to the recorded statement the petitioner provided the police, when he was stopped by the officers, he told them that he was not attempting to flee. He stated that he was on his way to his attorney to provide him with the letter he received from Callahan explaining his death. He further stated that he and his attorney were planning to meet at the attorney's office at 3:30 p.m. and were to be at the Hoover Police Department at 4:00 p.m. (Doct. 13, Ex. D, Tr. P. 70).

A [appellant]: Okay.

Q: Go ahead.

A: Is it going to piss y'all. off if I ask for my--to talk to a friend that is an attorney. I mean, I'm going to do whatever I have got to do. Don't get me wrong.

Q: Well, I understand that. I understand what you are saying.

A: You have got to realize, man, I'm . . . scared to death.

Q: Well, and rightfully so. I don't blame you one bit because there's a serious problem here, but if you didn't pull the trigger, then we need to know what exactly happened, okay?

Q (By Sgt. Braden): It's up to you, Greg, whatever you want to do. Like he said.

A: Listen, I don't know exactly what happened. I was not there.

Q (By Det. Zarzour): Okay.

Q (By Sgt. Braden): We know you met--we know you met him over at Pick-a-Pack, we know y'all. left, we know you brought him back. We know all that. We know where you were, we have got people that have, seen you, we know. It's like I told you earlier, we alrcady know.

> Q (By Det. Zarzour): That's why I said don't beat around the bush, let's get to it and get it over with.
>
> A: All right.

(Doct. 13, Ex. D, Tr. pp. 32-34)

As already noted, the petitioner does not dispute the facts but assets that the Court of Appeals misapplied the relevant Supreme Court case law. (Doct. 18, p. 3). This court can grant the petitioner relief only if it concludes that "the decision is so clearly incorrect that it would not be debatable among reasonable jurists." *Neelley*, 138 F.3d at 924.

Reviewing the entire record, the court agrees with the assessment of the Court of Criminal Appeals and independently concludes that the petitioner's statement is not the unambiguous request for counsel required by *Davis*. *See Brown*, 668 So. 2d at 103. This statement is not the clear articulation of a desire to have counsel present such "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis*, 129 L. Ed. 2d at 371. Because of the lack of clarity, neither *Davis* or *Edwards* required the officers to discontinue the questioning. Although it may have been more prudent for the officers to follow-up on the petitioner's statement, *Davis* clearly does not require chat.

In support of the argument that a reasonable police officer in the circumstances should have understood the statement to be a request for counsel, the petitioner cites to Detective Zarzour's statement made immediately after his comment, "Well, I understand that. I understand what you

are saying." (Doct. 13, Ex. D, p. 33). Giving full consideration to the petitioner's comment, Detective Zarzour's statement, the dynamics involved in custodial interrogations between the interrogator and the individual being questioned, and the context, the court is convinced that the standard set forth in *Davis* has not been satisfied. To the contrary, the record shows that immediately after the terse, ambiguous statement by the petitioner, he began to explain his involvement in the crime. Under these circumstances, at best, the petitioner's actions may be enough to show he was considering invoking the right to counsel. However, that is not sufficient under *Davis* and the petitioner clearly intended to go forward without counsel and make a statement.

In sum, this court concurs in the conclusion of the Court of Criminal Appeals. Accordingly, absent a showing that "the decision is so clearly incorrect that it would not be debatable among reasonable jurists," the petitioner is not entitled to any relief. *Neelley*, 138 F.3d at 924.

2. Voluntariness

The petitioner also asserts that the admission of his statement at trial, was in error since it was the result of improper promises and suggestions that things would go better for him if he confessed. (Doct. 1, p. 13). In support of this claim, the petitioner cites to various portions of the record. The pertinent portions include the following colloquy:

> Q: Now, what you tell us and what [sic] you help yourself is up to you, Greg, not us. It's up to you. If you didn't pull the trigger, you

need to tell us. You need to tell us who did and we need to hear the whole story and he done with it and get this thing over with and clear it up, Greg, because it is putting heat on everybody and you are going to get some heat on you, but the degree of heat you're going to get is up to Greg. It's not up to us--it's up to Greg. Okay? That's as straightforward as I can be, bud. I can't be any more forward. That is what I feel like happened.

I mean truthfully honest, that's what I feel like happened. I believe he might have been your friend and a good friend. You couldn't do it, but Gospodareck could and he did. Or something. Okay? It's all over with. I don't think if I didn't pull the trigger, Greg, I don't think I would take the heat for it, buddy. To be truthfully honest with you. [sic] It means a hell of a lot of difference in the court's eye who pulled the trigger, okay? I think it makes a lot of difference.

But if he did, we need to know about it and we need to straighten it up and clear it up right now as fast as we can. Because the longer we wait the tougher it is for everybody. He's got family that are sitting out there in limbo, you know, they want to know what happened. This may ease their pain a little bit, okay? But we need to find out who did it and I think I'm about real close to what happened. Real close to what happened. Because you met him up at the Pick-a-Pack

right during the same timespan that he was killed, okay?

SGT. BRADEN: We've got people who saw you there. Like I told you earlier, we know.

DET. ZARZOUR: We have got to have--we have got to have you help yourself here, Buddy. Not us, you help yourself. And if you are honest wit.h us and you come through this stuff--let's talk about it.

A: I understand what's happening here, okay?

Q: (By Det. Zarzour) Yeah, I know you do. We have got to do this, okay?

A: I understand.

Q: Okay. I know it's hard for you. I'm not going to say it is an easy task for you to do this, but what I'm telling you is the quicker we get this done, the better it is going to be for you. Okay? You are the one sitting in here. Gospodareck is not sitting in here, okay? But if I have to guess, Gospodareck got the money. That was his pay, your pay was the ring. Maybe a little bit of money.

Q (By Sgt. Braden): All the arrows are pointing toward Greg right now.

> Q (By Det. Zarzour): And I don't think that's fair.
>
> Q (By Sgt. Braden): No, that's not.
>
> Q (By Det. Zarzour): I don't think that's fair at all. And I don't think - personally, I don't think Jerry would have wanted it that way. I may be wrong.
>
> A: No, no.

(Doct. 13, Ex. D, Tr. pp. 29-31). Well into the interview and after the petitioner had made numerous inculpatory statements, Detective Zarzour stated:

> Q And - I want to ask you something else. So much of the cat is out of the bag. I know we - we have got a lot of loose ends to tie up, things we are going to have to do. You have cooperated and I couldn't ask for anything, you know, and like I said, that's what I'll do for you - we will go in and do the best we can do. I'm not a hard ass for people who cooperate, okay?
>
> A: Okay.

(Doct. 13, Ex. D, Tr. p. 76). After reviewing the record, the Court of Criminal Appeals held:

> The totality of the circumstances surrounding the appellant's statement convinces this court that the officers never offered any

> promises or hopes of reward to the appellant. They were simply making it clear to the appellant that it was not their job to establish that he was not the triggerman and that the appellant needed to tell them if he was not the triggerman. Thus, the appellant's statement was not unlawfully induced by some promise or hope of reward.

Brown, 668 So. 2d at 104. After an independent review of the record, the court again agrees with the conclusion of the Court of Criminal Appeals that the petitioner's statement was not unlawfully induced.

The petitioner was advised of his *Miranda* rights twice and executed a written waiver. The entire interview process which resulted in the recorded oral statement, and ultimately a written statement, concluded within about two hours, at approximately 7:30 p.m. There was no evidence of coercion or other improper actions by the police officers.

When the totality of the circumstances are examined and the officers' comments prior to the making of the confession are placed in context, they do not constitute promises of a reward or benefit that induced the petitioner to confess. His confession was clearly a consequence of his free will. The officers' statements that it was up to the petitioner to tell them what happened - to tell the truth - did not overcome his free choice. Their exhortations to get him to tell the truth do not make the confession involuntary. *See Crooker v. California*, 357 U.S. 423, 437, 78 S. Ct. 1287, 2 L. Ed. 2d 1445 (1958).

The comment by Detective Zarzour after the petitioner had substantially cooperated is merely a statement that he would not be hard on the petitioner and that he would make has cooperation known. It does not vitiate the voluntariness of the confession. *See United States v. Ballard*, 586 F.2d 1060, 1062 (5th Cir. 1978) (A statement that the accused's cooperation will be made known to the court is not sufficient inducement so as to render the statement involuntary), *citing United States v. Frazier*, 434 F.2d 994 (5th Cir. 1970). Additionally, that statement was made after the petitioner had substantially admitted his participation in Callahan's death.

VII. RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

In accord with the foregoing, the magistrate judge recommends that the petition for a writ of habeas corpus be **DISMISSED**.

Any party may file specific written objections to this report within fifteen (15) days of the date it is filed in the office of the Clerk. Any objections filed must specifically identify the findings in the magistrate judge's recommendation to which the objections pertain. Frivolous, conclusive, or general objections will not be considered by the district court. Failure to file written objections to the proposed findings and recommendations of the magistrate judge's report shall bar the party from a de novo determination by the district court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the district court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). **It is not neces-**

sary for the petitioner to repeat his legal arguments. As to the facts, if the petitioner does respond, he should limit himself to addressing the statements of fact contained in the report and recommendation to which he objects; the objections are not the place to make new allegations or present additional evidence. A copy of the objections must be served upon all other parties to the action.

The Clerk is **DIRECTED** to serve a copy of this Report and Recommendation upon the counsel for the petitioner and the respondent.

DONE this the 24th day of February, 1999.

JOHN E. OTT
UNITED STATES MAGISTRATE JUDGE

Ex parte Gregory Allan Brown (Re: Gregory Allan Brown v. State)

1941276

SUPREME COURT OF ALABAMA

668 So. 2d 105; 1995 Ala. LEXIS 379

September 15, 1995, RELEASED

SUBSEQUENT HISTORY: Released For Publication February 17, 1996.

PRIOR HISTORY: PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS. (Jefferson Circuit Court, CC-91-2136, Court of Criminal Appeals, CR-91-215). Michael W. McCormick, TRIAL JUDGE.

DISPOSITION: WRIT DENIED.

COUNSEL: For Petitioner: J. Louis Wilkinson of Wilkinson and Vinson, Birmingham.

For Respondent: Jeff Sessions, atty. gen.

JUDGES: COOK, Hornsby, C. J., and Almon, Ingram, and Butts, JJ., concur. Maddox, J., dissents.

OPINIONBY: COOK

OPINION: COOK, JUSTICE.

WRIT DENIED.

Hornsby, C. J., and Almon, Ingram, and Butts, JJ., concur. Maddox, J., dissents.

Ex parte Gregory Allan Brown

DISSENTBY: MADDOX

DISSENT: MADDOX, JUSTICE (dissenting).

I would grant the writ to review the petitioner's claim that his capital murder conviction should be overturned on the basis that the interrogating officers refused to cease questioning him after he requested counsel.

The Court of Criminal Appeals reversed Gregory Allan Brown's conviction, stating that the interrogation should have ceased when Brown made what it considered to be his "request" for counsel. *Brown v. State*, 630 So. 2d 481 (Ala. Cr. App. 1995). This Court denied the State's petition for the writ of certiorari, in which the State asked this Court to reverse the judgment of the Court of Criminal Appeals. The State appealed to the Supreme Court of the United States, and that Court remanded the case to the Court of Criminal Appeals for a reconsideration in light of the Supreme Court's ruling in *Davis v. United States*, __ U.S. __, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). Upon remand, the Court of Criminal Appeals, with Judge Taylor dissenting, determined that Brown's request for counsel was "certainly not an unambiguous request for counsel as required by *Davis*." 1995 Ala. Crim. App. LEXIS 74, *4, 668 So. 2d at __ (Ala. Crim. App. 1995).[1]

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[1] During his interrogation, Brown asked if it would make the officers

(continued...)

I would at least grant the writ to review the petitioner's claim that his request for counsel was "at a minimum, [a] statement that [could] reasonably [have been] construed to be an expression of a desire for the assistance of an attorney." *Davis*, _ U.S. at _, 114 S. Ct. at 2355, 129 L. Ed. 2d at _. It appears to me that in *Davis* the interrogating officers asked the defendant if he was requesting an attorney, after he had made an ambiguous statement about possibly wanting to have counsel present, and that the defendant responded by saying that he was not requesting counsel. On this point, the Court stated:

> Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not [the suspect] actually wants an attorney. That was the procedure followed by the [Naval Investigation Service] agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statements regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the offi-

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[1] (...continued)
angry "if I ask for my -- to talk to a friend that is an attorney? I mean, I'm going to do whatever I have got to do. Don't get me wrong."

> cers have no obligation to stop questioning him.

Davis, _ U.S. at _, 114 S. Ct. at 2356, 129 L. Ed. 2d at _. In view of this statement by the Supreme Court of the United States in *Davis*, I do not believe that that Court, by remanding this case for consideration in light of what it had said in Davis, determined that the Brown's request was "ambiguous" or "equivocal."

It appears to me that the facts of this case could be distinguished from those of the Davis case. The record shows that the interrogating officers made no attempt to clarify whether Brown was asking for counsel. After Brown made the statement quoted in footnote one, the interrogators responded:

> "Officer: Well, I understand that. I understand what you are saying.
>
> "Defendant: You have got to realize, man, that I'm f____ scared to death.
>
> "Officer: Well, and rightfully so. I don't blame you one bit because there is a serious problem here, but if you didn't pull the trigger, then we need to know exactly what happened, okay?"

It seems from this colloquy that the interrogating officers were aware that the statement by the defendant could "reasonably [have been] construed to be an expression of a desire for the assistance of an attorney." *Davis*. In fact, the substance of the colloquy could be construed as showing that

the interrogators were suggesting to the petitioner that if he was not guilty, then there would be no need for counsel.

Was Brown's "reference to an attorney . . . ambiguous or equivocal in that a reasonable officer in light of the circumstances" would have understood only that Brown might be invoking his right to counsel? *Davis*, _ U.S. at _, 114 S. Ct. at 2355, 129 L. Ed. 2d at __. Based on all the circumstances in this case, I would grant the petition and review Brown's claim; that claim presents an important constitutional question. Also, Brown's petition argues that his confession was not voluntarily given; I think this Court should also review that claim.

I make one further observation about the *Davis* case. Although all the Justices of the Supreme Court concurred in the result of the opinion in the *Davis* case, four Justices concurred only because the interrogators had stopped questioning after the defendant made his ambiguous request, in order to determine if the defendant was, in fact, requesting counsel. The interrogators did this clearly and resumed their questioning only after the defendant told them that he was not requesting counsel at that time. These four Justices (Justices Stevens, Blackmun, Souter, and Ginsberg) concurred for this reason and stated that they felt that a rule should be adopted requiring officers to inquire whether the defendant was asking for counsel. Justice Scalia also filed a concurring opinion, but stated that he had reservations about the Court's analysis of the legal issue.

Based on the foregoing, I am not convinced that *Davis* required the Court of Criminal Appeals on the remand to reach a result different from the result of its initial review.

Gregory Allan Brown v. State

CR-91-0215

COURT OF CRIMINAL APPEALS OF ALABAMA

668 So. 2d 102; 1995 Ala. Crim. App. LEXIS 74

March 3, 1995, RELEASED

SUBSEQUENT HISTORY:
Rehearing Denied May 5, 1995. Certiorari Denied September 15, 1995. Released For Publication February 17, 1996.

PRIOR HISTORY:
Appeal from Jefferson Circuit Court. (CC-91-2136). Michael McCormick, TRIAL JUDGE.

DISPOSITION:
AFFIRMED.

COUNSEL:
For Appellant: Louis Wilkinson, Birmingham.

For Appellee: James H. Evans, atty. gen., and Beth Poe, asst. atty. gen.

JUDGES:
COBB, JUDGE. All the Judges concur except Taylor, P.J., who dissents with opinion.

OPINIONBY:
COBB

OPINION:
ON REMAND FROM THE UNITED STATES SUPREME COURT

COBB, JUDGE

This case was originally assigned to another judge on the Court of Criminal Appeals. It was reassigned to Judge Cobb on January 17, 1995.

On August 13, 1993, this court reversed this appellant's conviction and held that "regardless whether the appellant's request to speak to his friend, who is an attorney, is considered a clear request or is considered an equivocal request, the investigators' failure to respond to or to clarify that request nonetheless violated the appellant's Fifth Amendment rights." *See Brown v. State*, 630 So. 2d 481, 484 (Ala. Crim. App. 1993). The Alabama Supreme Court denied certiorari review on December 17, 1993. On October 3, 1994, the United States Supreme Court remanded this cause to this court for further consideration in light of *Davis v. United States*, 512 U.S. ___, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994). The facts of this case were recited in our original opinion in Brown.

I.

In *Davis*, 512 U.S. at _, 114 S. Ct. at 2355, 129 L. Ed. 362 at __ the United States Supreme Court stated:

> "The applicability of the '"rigid" prophylactic rule' of *Edwards* [*v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)] requires courts to 'determine whether the

accused actually invoked his right to counsel.' *Smith v. Illinois*, 469 U.S. [91], at 95, 105 S. Ct. [490], at 492 [83 L. Ed. 2d 488 (1980)] (emphasis added [in Davis]), quoting *Fare v. Michael C.*, 442 U.S. 707, 719, 99 S. Ct. 2560, 2569, 61 L. Ed. 2d 197 (1979). To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. *See Connecticut v. Barrett*, 479 U.S. [523] at 529, 107 S. Ct. [828] at 832 [93 L. Ed. 2d 920 (1987)] Invocation of the Miranda right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' *McNeil v. Wisconsin*, 501 U.S. [171] at 178, 111 S. Ct. [2204], at 2209 [115 L. Ed. 2d 158 (1991)]. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. *See ibid.* ('the likelihood that a suspect would wish counsel to be present is not the test for applicability of Edwards;); *Edwards v. Arizona, supra*, 451 U.S. at 485, 101 S. Ct. at 1885 (impermissible for authorities 'to reinterrogate an accused in custody if he has clearly asserted his right to counsel') (emphasis added in Davis).

Rather, the suspect must unambiguously request counsel. As we have observed, 'a

> statement either is such an assertion of the right to counsel or it is not.' *Smith v. Illinois*, 469 U.S. at 97-98, 105 S. Ct. at 494 (brackets and internal quotation marks omitted). Although a suspect need not 'speak with the discrimination of an Oxford don, 114 S. Ct. at 2364 (SOUTER, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect. *See Moran v. Burbine*, 475 U.S. 412, 433, n. 4, 106 S. Ct. 1135, 1147, n. 4, 89 L. Ed. 2d 410 (1986) ('the interrogation must cease until an attorney is present only if the individual states that he wants an attorney') (citations and internal quotation marks omitted).

In this case, the appellant asked the officers "Is it going to piss y'all off if I ask for my -- to talk to a friend that is an attorney? I mean, I'm going to do whatever I have got to do. Don't get me wrong." This is certainly not an unambiguous request for counsel as required by Davis. Therefore, the appellant's assertion that his statements to the police should have been suppressed because, he says, they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), is without merit.

II.

The appellant contends the trial court erred by admitting his statement into evidence because, he says, his statement was obtained after "promises of beneficial treatment" were made to him by the police. The following portion of the record is relevant to a determination of this issue:

> Now, what you tell us and [whether] you help yourself is up to you, Greg, not us. If you didn't pull the trigger, you need to tell us. You need to tell us who did and we need to hear the whole story and be done with it and get this thing over with and clear it up, Greg, because it is putting heat on everybody and you are going to get some heat on you, but the degree of heat you're going to get is up to Greg. It's not up to us--it's up to Greg. Okay? That's as straightforward as I can be, Bud. I can't be any more forward. That is what I feel like happened.
>
> . . . .
>
> We have got to have -- we have got to have you help yourself here, Buddy. Not us, you help yourself. And if you are honest with us and you come through this stuff --let's talk about it.
>
> Okay. I know it's hard for you. I'm not going to say it is an easy task for you to do this, but what I'm telling you is the quicker we get this

done, the better it is going to be for you. Okay?" (R. 29-31.)

In *Gentry v. State*, 1994 Ala. Crim. App. LEXIS 415, [Ms. 92-0409, September 30, 1994] _ So. 2d _ (Ala. Crim. App. 1994), this court stated:

> Extrajudicial confessions are prima facie involuntary and inadmissible as evidence; the burden is on the state to show voluntariness and a Miranda predicate in order for such confessions to be admitted into evidence. *Lewis v. State*, 535 So. 2d 228 (Ala. 1988). In order for a confession to be admitted into evidence it cannot be the result of any direct or implied promise, however slight. *Goodson v. State*, 540 So. 2d 789 (Ala.Cr.App.), cert. denied, 540 So. 2d 789 (Ala. 1989). Whether there was a voluntary and knowing waiver of Miranda rights must be decided from the particular facts and circumstances of each case, including the background, experience, and conduct of the accused -- the totality of the circumstances. Lewis v. State; *Magwood v. State*, 494 So. 2d 124 (Ala.Cr.App.), aff'd, 494 So. 2d 154 (Ala.), cert. denied, *479 U.S. 955 (1986).*
>
> 'The true test of voluntariness of extra-judicial confessions is whether, under all surrounding circumstances, they have been induced by a threat or a promise, express or implied, operating to produce in the mind of the prisoner apprehension of harm or hope of favor; such

> confessions must be excluded from the consideration of the jury as having been procured by undue influence.'"

Ex parte Weeks, 531 So. 2d 643, 644 (Ala. 1988), quoting *Womack v. State*, 281 Ala. 499, 205 So. 2d 579 (1967). The question of whether a confession is voluntary is initially to be determined by the trial court, and thereafter the voluntariness as affecting the credibility and weight to be given any statement that an accused has made is a determination for the jury. *Lewis v. State*; *Ex parte Singleton, 465 So. 2d 443 (Ala. 1985)*. The trial court need only be convinced from a preponderance of the evidence to find a confession to have been voluntarily made. *Ex parte McCary*, 528 So. 2d 1133 (Ala. 1988); *Ex parte Singleton* __ So. 2d at __.

The totality of the circumstances surrounding the appellant's statement convinces this court that the officers never offered any promises or hopes of reward to the appellant. They were simply making it clear to the appellant that it was not their job to establish that he was not the triggerman and that the appellant needed to tell them if he was not the triggerman. Thus, the appellant's statement was not unlawfully induced by some promise or hope of reward. The trial court's decision was not "manifestly contrary to the great weight of the evidence." *Williams v. State*, 456 So. 2d 852, 855 (Ala. Crim. App. 1984).

The judgment is affirmed.

AFFIRMED.

All the Judges concur except Taylor, P.J., who dissents with opinion.

DISSENTBY:
TAYLOR

DISSENT:

TAYLOR, PRESIDING JUDGE, DISSENTING

I respectfully dissent from the majority's holding that the appellant's statement to police was not an unambiguous request for counsel. The appellant's question during police interrogation, "Is it going to piss y'all off if I ask for my -to talk to a friend that is an attorney? I mean, I'm going to do whatever I have got to do. Don't get me wrong," was sufficient to convey to the police officers interrogating him that he wanted to talk to a lawyer.

This question was an "unequivocal" request for counsel. *See Davis v. United States*, 512 U.S. __, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). As the United States Supreme Court stated in Davis:

> The suspect must unambiguously request counsel. As we have observed, 'a statement either is such an assertion of the right to counsel or it is not.' *Smith v. Illinois*, 469 U.S. [91] at 97-98, 105 S. Ct. [490] at 494 [93 L. Ed. 2d 488 (1984)]. . . . Although a suspect need not 'speak with the discrimination of an Oxford don,' . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.

512 U.S. at __, 114 S. Ct. at 2355, 129 L. Ed. 2d at 371.

The statement in the present case can only be construed as a request for counsel. The phrase, "Is it going to piss y'all off if . . ." suggests that the interrogatee did not want to arouse the anger of the interrogators. The phrase, "I mean, I'm going to do whatever I have got to do," indicates that the interrogatee thought he would have to make a statement and was not refusing to "do whatever [he has] got to do." The phrase, "Don't get me wrong," again is a request to the interrogators not to interpret any of the interrogatee's actions as hostile or uncooperative. Once these fear-based qualifying statements from the interrogatee are dealt with, what he is saying is that he wanted "to talk to a friend that is an attorney." This is a real-life interrogation and a real-life request for an attorney by an intimidated suspect who is in close confinement and is surrounded by law enforcement officers.

Because the authorities disregarded the appellant's unequivocal request for counsel and continued the questioning, the appellant's statement should have been suppressed. Receipt of the statement into evidence violated his constitutional right to counsel.

ALABAMA v. BROWN, GREGORY ALLEN

93-1510

SUPREME COURT OF THE UNITED STATES

513 U.S. 801; 115 S. Ct. 43; 130 L. Ed. 2d 5; 1994 U.S. LEXIS 5402; 63 U.S.L.W. 3256

October 3, 1994, Decided

JUDGES:
Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals of Alabama for further consideration in light of *Davis v. United States*, 512 U.S. 452 (1994).

Gregory Allen Brown v. State

CR-91-0215

COURT OF CRIMINAL APPEALS OF ALABAMA

630 So. 2d 481; 1993 Ala. Crim. App. LEXIS 1017

August 13, 1993, Released

SUBSEQUENT HISTORY:
First Correction.

PRIOR HISTORY:
Appeal from Jefferson Circuit Court. Michael McCormick, Judge. (CC-91-2136).

DISPOSITION:
REVERSED AND REMANDED.

COUNSEL:
For Appellant: Louis Wilkinson, Birmingham.

For Appellee: James H. Evans, atty. gen., and Beth Poe, asst. atty. gen.

JUDGES:
MONTIEL

OPINIONBY:
MONTIEL

OPINION:
MONTIEL, JUDGE

The appellant, Gregory Allen Brown, was indicted for murder, made capital because it was accomplished pursuant to a contract. *See* § 13A-5-40(a)(7), Code of Alabama 1975. The jury found the appellant guilty as charged in the indictment and recommended that he be sentenced to life imprisonment without parole. The trial court accepted the jury's recommendation and sentenced the appellant to life imprisonment without the possibility of parole.

The evidence presented by the State tends to establish the following. Jerry Wayne Callahan, the victim, was the owner of a wholesale diamond business and owned a 90% interest in Riverchase Jewelers, a jewelry store in Jefferson County, Alabama. The evidence tended to show that the businesses owned by Callahan were in serious financial trouble. The appellant owed approximately $ 1,100,000 on notes secured by the businesses, which he told witnesses he could not pay.

The appellant was a friend of Callahan's and became acquainted with him through gambling ventures. The appellant was the dealer in high stakes card games in which Callahan participated. Witnesses for the State testified that the appellant and Callahan had participated in a card game on the night of February 6, 1991, and that Callahan had won $15,000. The following day, February 7, 1991, the appellant paid Callahan $9,000 of the money that he had won at the card game.

Pat Costello, who owned the remaining 10% interest in Riverchase Jewelers, testified that Callahan had been upset over his financial situation and that he once commented that

he would be better off dead. He testified that Callahan did not come into the store on February 7, 1991, the day of Callahan's death. He said that on that day the appellant had come to the store twice, once to pick up a large diamond ring, the appraised value of which was $ 15,600, and the next time to pick up paper-work regarding the ring. According to Costello, Callahan had instructed him to give the appellant these items and the appellant did not pay for the ring.

A neighbor who lived near Callahan testified that between 3:30 and 4:00 p.m., he heard a knock on his door. When he opened the door, he saw an individual, who he described as being the approximate height and weight of Robert Gospodareck, a codefendant in this case, walking down the stairs. Another neighbor testified that between 3:00 and 4:00 in the afternoon of February 7, 1991, she heard a loud "bang." On that same day, a woman who had occasionally dated Callahan discovered his body in his apartment. Callahan had been shot once through the heart.

Jerry Noto, the owner of a local convenience store, testified that the appellant had been in his store on two times on the day of Callahan's death. The first time the appellant came into the store, he was displaying the diamond ring. According to Noto, the appellant left the store and returned with Gospodareck. Witnesses testified that the appellant and Gospodareck were at the store between 4:30 and 5:00 on the afternoon of the killing. According to the witnesses, the appellant talked with Gospodareck for a short while and then Gospodareck left the store. Noto testified that the appellant appeared nervous. Testimony established that Callahan's apartment was near Noto's store.

During their investigation of Callahan's death, investigators with the Hoover Police Department, Detective Peyton Zarzour and Sergeant Edward Braden, received

information that the appellant was involved in the card game that took place the night before Callahan's death. The investigators contacted the appellant by telephone to arrange a meeting with him at the Hoover Police Department to discuss their investigation. The appellant agreed to meet with the investigators. As the time of the meeting approached, the investigators were watching the appellant's home. The investigators saw the appellant load his vehicle with luggage and boxes. The appellant then got into his vehicle and drove toward Fultondale, Alabama, in the opposite direction of the Hoover Police Department. The investigators suspected that the appellant was attempting to leave town without meeting with them and they asked Gardendale police officers stop the appellant's vehicle. Once they stopped the vehicle, the Gardendale police called the investigators to the scene. The appellant assured them that he still planned to meet with them as he had told them earlier he would.

Zarzour, without entering the vehicle, saw a .45 caliber handgun inside the appellant's vehicle. The appellant told the investigator that Callahan had given him the gun. The appellant then told the investigators that he had a letter that would explain everything. The appellant permitted the investigators to enter his car and get the letter. The letter was handwritten and stated:

> I, Jerry W. Callahan, being of sound mind and body, do state that it is my wish that if certain parties are arrested for causing my death I do not wish for their prosecution.
>
> This party has enabled me to leave this life with some form of dignity and self respect.
>
> My deteriorating condition and the nonexisting chance of any survival have lead me to call on my friend for the ultimate act of

friendship.

> Dr. Charles Clark of St. Vincent and Dr. Zeiger of Carraway can and will attest to my poor chance of any kind of decent existence in my last weeks. I did not want my family to live with the stigma that I took my own life coupled with the fact they didn't know of my condition.
>
> Please know that this act was done in the manner that I chose, which would cause myself and the above mentioned party the least amount of suffering.

The note was signed by Callahan. At trial, a handwriting analyst testified that in his opinion the note was written by Callahan.

The appellant was then read his Miranda rights, was placed under arrest, and was taken to the Hoover police station. The appellant was again read his Miranda rights before any statements were taken. The appellant indicated that he understood his rights, and he signed a waiver of rights form and a consent to search form. The appellant's statement was videotaped. After the appellant made his videotaped statement, he made a written statement. In his statements, the appellant explained his participation in the offense and implicated Gospodareck in the shooting of Callahan.

A forensics expert testified that an autopsy on Callahan did not reveal any life threatening illness that would, in the near future, cause Callahan's death. Also, the testimony reflected that the doctors named in Callahan's note had not treated Callahan for any life threatening illness.

I.

The appellant argues that the trial court erred in failing to suppress the statements he made to the detectives. Specifically, the appellant argues that the statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct 1880, 68 L. Ed. 2d 378 (1981), because, he says, during the course of giving his videotaped statement, the appellant requested that he be allowed to speak to an attorney and the officers did not provide him with counsel nor did they clarify his request for counsel before continuing with their interrogation.

The transcript of the videotaped statement of the appellant shows that the following conversation took place:

"Q (By Sgt. Braden) From the very start.

"Q (By Det. Zarzour) From the very start. From the time he gave you the letter --

"A [appellant] Okay.

"Q Go ahead.

"A Is it going to piss y'all off if I ask for my -- to talk to a friend that is an attorney. I mean, I'm going to do whatever I have got to do. Don't get me wrong.

"Q Well, I understand that. I understand what you are saying."

"A You have got to realize, man, I'm . . . scared to death.

"Q Well, and rightfully so. I don't blame you one bit because there's a serious problem here, but if you didn't pull the trigger, then we need to know what exactly happened, okay?

"Q (By Sgt. Braden) It's up to you, Greg, whatever you want to do. Like he said.

"A Listen, I don't know what exactly happened. I was not there.

"Q Okay.

"Q We know you met -- we know you met him over at Pick-a-Pack, we know y'all left, we know you brought him back. We know all that. We know where you were, we have got people that have seen you, we know.

It's like I told you earlier, we already know.

"Q (By Det. Zarzour) That's why I said don't beat around the bush, let's get to it and get it over with.

"A All right. . . ."

Before this colloquy, the appellant had made no incriminating statements. After this colloquy, the appellant gave the investigators information regarding the death of Callahan. After the appellant gave the videotaped statement, the appellant then made a summarized written statement. We agree with the appellant that both statements were due to be suppressed.

In Miranda, the United States Supreme Court held that under the Fifth Amendment, an accused has the right to

counsel during custodial interrogation. In Edwards, our Supreme Court expounded on the accused's Fifth Amendment rights and held:

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges or conversations with the police.

451 U.S. at 484 (footnote omitted).

In this case, the appellant's request to speak to a friend who is also an attorney was clearly an invocation of his right to counsel. Further interrogation by the investigators without providing the appellant the opportunity to confer with an attorney violated the appellant's Fifth Amendment rights as discussed in Miranda and Edwards.

The State argues in its brief that, "At most, the comments made by Appellant could be considered an equivocal invocation of his right to counsel." However, even if we assumed that the appellant's request to speak to an attorney was equivocal or ambiguous, the failure of the investigators to clarify his request to speak to his attorney still violates

Miranda. In *Robinson v. State*, 574 So. 2d 910, 914 (Ala. Crim. App. 1990), we adhered to the holdings of the Fifth Circuit and Eleventh Circuit Courts of Appeals:

> 'When a defendant makes an equivocal request for an attorney during a custodial interrogation, "the scope of that interrogation is immediately narrowed to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified." *Thompson v. Wainwright*, 601 F.2d 768, 771 (5th Cir. 1979) (emphasis in original); *Nash v. Estelle*, 597 F.2d 513, 517 (5th Cir.) (en banc), cert. denied, 444 U.S. 981, 100 S. Ct. 485, 62 L. Ed. 2d 409 (1979). Any statement taken by the state after the equivocal request for counsel is made, but before it is clarified as an effective waiver of counsel, violates Miranda.' *Owen v. Alabama,* 849 F.2d 536, 539 (11th Cir. 1988).

Contrary to the State's argument, we hold that at the very least the appellant's comment was an equivocal request to speak to counsel. Additionally, we conclude that the investigators did not clarify the appellant's request to confer with counsel. Rather, the investigators continued their interrogation as if the request to speak with counsel had not been made, telling the appellant how serious the matter was, prodding him to provide more information, and ignoring the requirement that their inquiries after the appellant's request was made be specifically limited to clarifying that request. Thus, regardless whether the appellant's request to speak to his friend who is an attorney is considered a clear request or is considered an equivocal request, the investigators' failure

to respond to or to clarify that request nonetheless violated the appellant's Fifth Amendment rights.

Because the appellant's statements were obtained in violation of his Fifth Amendment rights, the statements obtained after his invocation of his right to confer with counsel were due to be suppressed.

II.

The appellant further argues that his statements were due to be suppressed because they were not voluntarily made and were obtained by unlawful inducements. Because we are holding that the appellant's statements were due to be suppressed for the reasons set forth in part I of this opinion, we need not address this argument.

The judgment of the trial court is due to be, and it is hereby, reversed and this case is hereby remanded for a new trial.

REVERSED AND REMANDED.

All Judges concur.